Supreme Court, U.S.
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No. _____

In the

Supreme Court of the United States

October Term, 2000

ADAMS OUTDOOR ADVERTISING,

Petitioner

v

CITY OF EAST LANSING,

Respondent

On Petition for Writ of Certiorari to the Supreme Court of the State of Michigan

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PETITION FOR WRIT OF CERTIORARI

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32 pp

QUESTIONS PRESENTED

1. Whether the Michigan Supreme Court's ruling that the Petitioner/Lessee did not have a property right protected by the Fifth Amendment of the United States Constitution conflicts with this Court's rulings in United States v. General Motors, 323 U.S. 373; 65 S. Ct. 357; 89 L.Ed. 311 (1945) and United States v. Petty Motor Co., 327 U.S. 372; 66 S.Ct. 596; 90 L.Ed. 729 (1946), both of which recognized that the Fifth Amendment of the United States Constitution protected a tenant's interest in real property?

2. Whether the Michigan Supreme Court's ruling that the Respondent had not unconstitutionally taken the Petitioner's interest in its rooftop billboards conflicts with and is contrary to this Court's ruling in Lucas v. South Carolina Coastal Council, 505 U.S. 1003; 112 S.Ct. 2886; 120 L.Ed. 2d 798 (1992)?

3. Whether the Michigan Supreme Court committed reversible error when it found that the Defendant's sign code did not effect a taking of Petitioner's interest in its rooftop signs because the Defendant's ordinance predated the Petitioner's acquisition of the billboards and leases and predated the subsequent renewal of the leases?

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The Petitioner, Adams Outdoor Advertising, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Michigan Supreme Court, entered in the above-entitled proceeding on July 26, 2000.

OPINIONS BELOW

This petition is from a decision of the Michigan Supreme Court reported at 463 Mich. 17; 614 N.W. 2d 634 (Mich. 2000) rehearing denied, 463 Mich. 1211 (Mich., 2000). The Michigan Supreme Court decision is reproduced as Appendix item A. The Order denying the Petitioner's motion for rehearing is reproduced as Appendix item B.

The Michigan Supreme Court decision reversed a Michigan Court of Appeals decision, Adams Outdoor Advertising v. City of East Lansing, 232 Mich. App. 587; 591 N.W. 2d 404 (Mich. App. 1998). This decision is reproduced as Appendix item C.

There was one relevant decision by the Ingham County Circuit Court. The Trial Court's bench opinion is reproduced as Appendix item D. The Trial Court's January 8, 1997 Order is reproduced as Appendix item E.

JURISDICTION

The Opinion of the Michigan Supreme Court which is the subject of this Petition was filed and entered

on July 26, 2000. Thereafter, the Petitioner, Adams Outdoor Advertising, timely filed a motion for rehearing pursuant to Michigan Court Rule (M.C.R.) 7.313(D). The Michigan Supreme Court denied the Petitioner's motion for rehearing on September 19, 2000 (Appendix, item B). This Petition for Writ of Certiorari is timely filed in accordance with Rule 13.1 of the Rules of this Court. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION AT ISSUE

The Fifth Amendment to the United States Constitution states in relevant part:

> "[N]or shall private property be taken for public use without just compensation."

The Fifth Amendment is applicable to the states through the Fourteenth Amendment. Penn Central Transportation Co. v. New York City, 438 U.S. 104, 122; 98 S. Ct. 2646; 57 L.Ed. 2d 631 (1978).

STATEMENT OF THE CASE

FACTS

This case arises out of the Respondent City of East Lansing's (hereafter Respondent or East Lansing) elimination of the Petitioner Adams Outdoor Advertising's (hereafter Adams or Petitioner) lawfully constructed and

expressly permitted rooftop billboards. Adams leases two separate parcels of real property within the City of East Lansing (Plaintiff's trial exhibits 1 and 2 – leases for 1108 E. Grand River Avenue and 111 N. Harrison, East Lansing, Michigan). It maintains and uses a rooftop outdoor advertising structure at each location. There are two 12 feet by 25 feet back-to-back poster panels located at 1108 E. Grand River Avenue and there are three poster panels located at 111 N. Harrison (Plaintiff's trial exhibits 1, 2 and 30). One of the properties was first leased to one of Adams' predecessors in 1954 (Plaintiff's trial exhibit 2). The other was first leased to Adams' predecessor in 1968 (Petitioner's trial exhibit 1). In 1968, the Defendant issued permits to Adams' predecessor, Central Advertising Company, for the billboards (Petitioner's trial exhibit 15 – request for admissions, ¶¶2-4 and Petitioner's trial exhibit 16 – Defendant's answers to request for admissions). The Petitioner's signs complied with the Defendant's code of ordinances before the Defendant adopted its current sign code which is at issue in this case (Petitioner's trial exhibit 15 – request for admissions, ¶¶5-7 and Petitioner's trial exhibit 16 – Defendant's answers to request for admissions, ¶¶5-7).

In 1975, the respondent adopted its current sign code. Section 8.38(12) of the code prohibits rooftop billboards and signs (Appendix, item F, p. 2). Section 8.39(8) of the code required the elimination of all non-conforming signs by May 1, 1987 (Appendix, item F, p. 3). The Respondent's sign code required the elimination

of Adams' signs (Trial Tr. pp. 159-160). The Respondent's sign code did not provide for the payment of compensation for the elimination of the non-conforming billboards (Trial Tr., p. 88; Petitioner's Trial exhibit 15 – request for admissions, ¶10 and Petitioner's trial exhibit 16 – Defendant's answers to request for admissions, ¶10). The evidence presented at trial was that the value of Adams' rooftop signs was $57,500 and $55,000, respectively, for a total of $112,500 (Trial Tr., pp. 87-88).

THE LITIGATION

1. The Ingham County Circuit Court (Trial Court).

In its Complaint in the Ingham County Circuit Court (the Trial Court), Adams Outdoor Advertising, and other parties not presently involved at the instant stage of the proceeding, sought a declaratory judgment that the Defendant's uncompensated elimination of Adams' previously lawful nonconforming billboards was contrary to the Fifth Amendment of the United States Constitution. Adams had also sought a declaration that the Respondent's ordinance was contrary to Michigan statutory law. Although the Trial Court and the Michigan Court of Appeals agreed with the latter, the Michigan Supreme Court found to the contrary. Adams v. East Lansing, 439 Mich. 209, 219; 483 N.W. 2d 38 (1992) (Adams I). The Michigan Supreme Court remanded the case to the Trial Court to determine whether the application of the Defendant's sign code to Adams' signs resulted in an unconstitutional taking. 439 Mich. at 219.

Following the Michigan Supreme Court's 1992 remand, the Trial Court conducted a trial on December 9, 1996. In its Trial Brief, Adams argued that the Defendant's elimination of the rooftop billboards was an unconstitutional taking, contrary to the Fifth Amendment. The Trial Court so found (Appendix, items D and E).

2. Michigan Court of Appeals.

The Michigan Court of Appeals affirmed the Trial Court's ruling insofar as it pertained to Adams' rooftop billboards. 232 Mich. App. 587, 605; 591 N.W. 2d 404 (1998) (Appendix, item C, p. 19).

3. Michigan Supreme Court.

Despite the fact that the Respondent had failed to make such an argument, the Michigan Supreme Court analyzed Adams' rights vis-à-vis those of the Lessors who were not parties to the case. 463 Mich. at 24 - see Appendix, item A, p. 8. As described above, the Court found that the Lessors had no right to display the rooftop signs upon their rooftops and that Adams lacked such a right as well. 463 Mich. at 26; Appendix, item A, p. 10. The Court also found that because Adams had acquired its rooftop signs and leases in 1983 and had renewed those leases in 1993 and 1996, it lacked a reasonable expectation that it could maintain its signs after the ordinance's effective date of May 1, 1987. 463 Mich. at 27; see, Appendix, item A, p. 11.

SUMMARY OF ARGUMENT

The Michigan Supreme Court's analysis of Adams' constitutional rights as a lessee, as being derivative of those of its lessors, conflicts with this Court's recognition that the Fifth Amendment applies to a tenant's interest in

property. United States v. General Motors, supra, and United States v. Petty Motor Co., supra.

The enforcement of the Defendant's sign code results in the complete elimination of Adams' rooftop billboards. This is a "categorical" taking and is contrary to this Court's ruling in Lucas v. South Carolina Coastal Council, supra.

The Michigan Supreme Court's holding that Adams did not have a reasonable expectation that it could maintain its signs and renew its leases after the effective date of the Defendant's ordinance is also contrary to Lucas, supra, and well-established common law real property principles. As noted later in this Petition, the question of whether one's regulatory takings claim is barred where the enactment of the regulation at issue predates the claimant's acquisition of the property is presently pending before this Court in Palazzolo v. Rhode Island, Supreme Court Docket No. 992047, cert. granted, 69 U.S. Law Week 3257 (October 10, 2000); see, 69 U.S. Law Week 3027 (July 11, 2000) for the statement of the questions presented in Palazzolo, supra.

REASONS FOR GRANTING THE WRIT

GROUNDS FOR ADAMS' PETITION

The grounds for the instant petition are as follows. First, the Michigan Supreme Court has decided an important federal question (i.e., whether a governmental

body had unconstitutionally taken one's leasehold interest in property without the payment of just compensation therefor, contrary to the Fifth Amendment) in a way that conflicts with the relevant decisions of this Court, including United States v. General Motors, supra, United States v. Petty Motors, supra, Lucas v. South Carolina Coastal Council, supra, and Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470; 93 S. Ct. 791; 35 L. Ed. 1 (1973). See, Rule 10(c) of the Supreme Court Rules.

Second, the Michigan Supreme Court has decided an important question of federal law (see above) in a way which conflicts with Lucas, supra, which prohibits the uncompensated "categorical taking" of one's property. See, Rule 10(b) of the Supreme Court Rules.

Third, the Michigan Supreme Court has decided an important question of federal law, i.e., whether one can maintain a regulatory taking claim where the regulation at issue predated the property owner's acquisition of the property, which has not been, but should be, settled by this Court. See, Rule 10(c) of the Rules of the Supreme Court. This particular issue is presently before the Court in the matter of Palazzolo v. Rhode Island, supra.

A. THE MICHIGAN SUPREME COURT'S RULING THAT THE PETITIONER/ LESSEE DID NOT HAVE A PROPERTY RIGHT PROTECTED BY THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION CONFLICTS WITH THIS COURT'S RULINGS IN UNITED STATES v. GENERAL MOTORS, 323 U.S. 373; 65 S. CT. 357; 89 L.ED. 311 (1945) AND UNITED STATES v. PETTY MOTOR CO., 327 U.S. 372; 66 S.CT. 596; 90 L.ED. 729 (1946), BOTH OF WHICH RECOGNIZED THAT THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION PROTECTED A TENANT'S INTEREST IN REAL PROPERTY.

The Michigan Supreme Court found that the constitutional rights of Adams, the lessee, were derivative of those of its two lessors. 463 Mich. at 24-26. By doing so, the Michigan Supreme Court decision ran afoul of this Court's ruling in United States v. General Motors, supra. In that matter, the United States had condemned part of General Motors' leasehold for the storage of wartime material. 323 U.S. at 375. The government had not condemned the landlord's fee interest but instead only sought to take the lessee's interest in the property. 323

U.S. at 375. During the course of its opinion this Court recognized that:

> "the right to occupy, for a day, a month, a year, or a series of years, in and of itself and without reference to the actual use, needs or collateral arrangements of the occupier, has a value." 323 U.S. at 379.

This Court then held:

> "When [the government] takes the property, that is, the fee, the lease, whatever [one] may own, terminating altogether his interest, under the established law it must pay him for what is taken..." 323 U.S. at 382.

The Michigan Supreme Court's derivative analysis of Adams' rights is contrary to this Court's analysis of General Motors' Fifth Amendment rights. It is also contrary to this Court's finding in United States v. Petty Motor Co., 327 U.S. 372; 66 S. Ct. 596; 90 L. Ed. 729 (1946), another case arising out of the government's condemnation of a property for use during World War II. Although the building's owner had agreed that the government may temporarily use the property, the United States proceeded to condemn the various tenants' leasehold interests. 327 U.S. at 374. During the course of its opinion, this Court in Petty Motor Co. said:

> "... It is immaterial whether the government actually took the leaseholds of the tenants in addition to taking the temporary use of the fee or only destroyed the tenants' right of occupancy. If any property is taken, compensation is required." 327 U.S. at 378.

The instant Michigan Supreme Court's ruling is directly contrary to the principles of General Motors and Petty Motor Co. In neither of those cases did this Court determine whether the respective tenant's rights to compensation were derivative of the respective lessor's rights. In both of those cases, the landlord/lessor's interest was not at issue. In General Motors, the government had not condemned the fee. 323 U.S. at 375. In Petty Motor Co., the lessor had agreed that the government could use the property. 327 U.S. at 374. Notwithstanding those lessors' situations, this Court found that the Fifth Amendment protected the rights of the lessees in both of those cases.

Because the Michigan Supreme Court's ruling is contrary to this Court's rulings in General Motors, supra, and Petty Motor Co., supra, Adams respectfully requests the Court to grant the Petition for Certiorari and thereafter reverse the Michigan Supreme Court's erroneous ruling.

B. THE MICHIGAN SUPREME COURT'S RULING THAT THE RESPONDENT HAD NOT UNCONSTITUTIONALLY TAKEN THE PETITIONER'S INTEREST IN ITS ROOFTOP BILLBOARDS CONFLICTS WITH AND IS CONTRARY TO THIS COURT'S RULING IN LUCAS v. SOUTH CAROLINA COASTAL COUNCIL, 505 U.S. 1003; 112 S.CT. 2886; 120 L.ED. 2D 798 (1992)

The instant Trial Court relied upon Lucas v. South Carolina Coastal Council, supra in support of its finding that the Defendant's ordinance was unconstitutional (Appendix, item D, p. 5).

In Lucas, the State of South Carolina had enacted a statute which prevented the erection of a structure upon one's beach-front property. Lucas sustained the beach-front property owner's contention that the adoption of a statute was an unconstitutional taking, and reaffirmed the general principle that:

> "When the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, this is, to leave his property economically idle, he has suffered a

> taking." 505 U.S. at 1019 (emphasis in original).

Like the State of South Carolina, the instant Defendant, by way of a legislative pronouncement (i.e., an ordinance), called upon Adams to sacrifice all of the economically beneficial uses of its rooftop billboards. The Trial Court correctly applied Lucas (and the instant Court of Appeals correctly applied its principle) to the Defendant's ordinance and found that the Defendant's compelled and uncompensated removal of Adams' rooftop signs was an unconstitutional taking. The Michigan Supreme Court erroneously ruled to the contrary. Adams respectfully requests this Court to grant its Petition for Certiorari and find that Lucas applies to the instant matter and mandates a finding that the Defendant's ordinance is contrary to the Fifth Amendment.

As this Court held in Lucas, the only constitutionally permissible basis for the government's right to take one's property without paying for it is if the property's use is a nuisance. Lucas held:

> "...as it would be required to do if it sought to restrain Lucas in a common-law action for public nuisance, South Carolina must identify background principles of nuisance and property law that prohibit the uses he now intends in the circumstances in which the property is presently found. Only on

> this showing can the State fairly claim that, in proscribing all such beneficial uses, the Beachfront Management Act is taking nothing." (underlining added, footnote omitted) 505 U.S. at 1031 - 1032.

By substituting the words "Adams," "East Lansing," "city," "rooftop billboards," and "sign ordinance" for the above underlined words, respectively, this Court can, and should, make Lucas' holding its own.

Adams' off-premises billboard signs are not a nuisance. The Respondent never claimed that they were. Further, during the course of its first opinion in this matter, the Michigan Supreme Court, through one of its justices, recognized that Adams' billboards "are not contraband." 439 Mich. at 239 (Justice Levin).

Also, the Michigan Legislature has recognized that:

> "Outdoor advertising is a legitimate commercial use of private property, is an integral part of the marketing function and an established segment of the economy of this state." M.C.L. 252.303; M.S.A. 9.391(103).

Adams' billboards are not nuisances. Lucas recognized that the government may not deprive one's property of its

"economic utility" unless that property's use qualifies as a nuisance. 505 U.S. at 1031. The instant Respondent, contrary to Lucas, has indeed deprived Adams' leasehold interests of their "economic utility." By doing so, the Defendant has taken Adams' property without the payment of just compensation, contrary to the Fifth Amendment.

C. THE MICHIGAN SUPREME COURT COMMITTED REVERSIBLE ERROR WHEN IT FOUND THAT THE DEFENDANT'S SIGN CODE DID NOT EFFECT A TAKING OF PETITIONER'S INTEREST IN ITS ROOFTOP SIGNS BECAUSE THE DEFENDANT'S ORDINANCE PRE-DATED THE PETITIONER'S ACQUISITION OF THE BILLBOARDS AND LEASES AND PREDATED THE SUBSEQUENT RENEWAL OF THE LEASES.

The Michigan Supreme Court purported to analyze Adams' regulatory takings claim under both the Lucas "categorical" analysis and the Penn Central Transportation Co. v. New York City, 438 U.S. 104; 98 S. Ct. 2646; 57 L.Ed. 2d 631 (1978) "balancing test." One of the factors relevant to the latter is:

> "The extent by which the regulation has interfered with distinct, investment-backed expectations." Penn Central, supra, 438 U.S. at 124.

Apparently referring to the third prong of Penn Central's balancing test, the instant Michigan Supreme Court found that Adams lacked a "reasonable expectation" that it could use its rooftop signs after May 1, 1987 where Adams had acquired its signs and leases in 1983 (after the 1975 passage of the ordinance) and had renewed its leases in 1993 and 1996. 463 Mich. at 27; see Appendix, item A, p. 11. Assuming arguendo, that this Court finds that the Defendant's ordinance did not result in a Lucas-style categorical taking, Adams respectfully requests the Court to grant the instant Petition for Certiorari, as it did in Palazzolo, supra, and thereafter find that Adams' acquisition of its signs and leases after the adoption of the ordinance, and its renewal of those leases after its effective date, does not preclude its claim.

Presently pending before this Court is Palazzolo v. Rhode Island, United States Supreme Court Docket No. 99-2047. The Court granted the Petition for Certiorari therein on or about October 10, 2000. 69 U.S. Law Week 3257 (October 10, 2000). One of the questions presented in Palazzolo is whether one's regulatory takings claim is barred whenever the regulation at issue predates the claimant's acquisition of the property. Palazzolo, Docket No. 99-2047, 69 U.S. Law Week 3027 (July 11,

2000). The Rhode Island Supreme Court had found that Mr. Palazzolo could not maintain his regulatory takings claim where the State of Rhode Island's regulation had predated his acquisition of the property. 746 A.2d 707, 715. The instant Michigan Supreme Court made a similar finding. 463 Mich. at 27. The Michigan Supreme Court made the same error that the Rhode Island Supreme Court made. Adams requests this Court to grant its Petition for Certiorari, as it did in Palazzolo, supra and find that Adams' acquisition of its billboards and leases after the adoption of the instant Respondent's 1975 sign code does not preclude a finding that Adams had a reasonable expectation that it could continue to maintain its rooftop billboards after May 1, 1987.

During the course of its opinion, Palazzolo referred to this Court's statement in Lucas, supra, that:

> "Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." Lucas, supra, 505 U.S. at 1027, cited in Palazzolo, supra, 746 A.2d at 715.

Palazzolo found that because the property owner therein had acquired his property after the State's regulations in question were already in place, the owner lacked a regulatory takings claim. 746 A.2d at 715. Palazzolo also relied upon the above Lucas statement when it rejected Mr. Palazzolo's argument that the date of the regulation's adoption was irrelevant. 746 A.2d at 716. Further, Palazzolo held that because the regulations had been in place when Mr. Palazzolo acquired the property, he lacked an investment-backed expectation that he could fill the coastal wetlands at issue therein. 746 A.2d at 717.

As noted in Palazzolo, supra, Lucas requires the Court to determine whether the nature of one's estate included the use in question. 746 A.2d at 715, citing Lucas, supra. An analysis of Adams' estate should lead this Court to grant the instant petition to reverse the erroneous ruling of the Michigan Supreme Court.

First, unlike the situation in Palazzolo, and of greater Fifth Amendment significance, the instant case involves the elimination of an existing use of property.[1]

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[1] Adams is unaware of any decision by this Court which upheld a governmental body's uncompensated elimination of an existing and lawful use of property. Typically, this Court has considered a regulatory takings claim within the context of the proposed development of one's property. See, e.g. City of Monterey v. Del Monte Dunes, 526

Palazzolo involved a request to develop raw land (coastal wetlands). The instant Respondent had issued permits for the rooftop billboards at issue more than seven years before the adoption of the ordinance and approximately 19 years before its effective date. The billboards were lawful before the Respondent passed and then later enforced its ordinance.

State common law principles define the property rights and interest that are protected by the United States Constitution. Board of Regents of State College v. Roth, 408 U.S. 564, 577; 92 S. Ct. 2701; 33 L.Ed. 2d 548 (1972). One such common law principle of real property law is that:

> "The right to maintain a nonconforming use does not depend upon ownership or tenancy of the land on which the use is situated. It is not personal to the current owner or tenant but attaches to the land itself. Accordingly, a change in the ownership or tenancy of a nonconforming business or structure does not affect the right to continue the nonconforming use; such right can be exercised equally by the purchaser. Since the right runs with the land, it is not lost although the use in question was

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U.S. 687, 704; 119 S.Ct. 1624; 143 L.Ed. 2d 882 (1999) and Lucas, supra.

conducted by a tenant and is carried on by a new tenant.

> "A change of ownership of land to which a nonconforming use has attached does not affect the right to such use although the change occurred after the restrictive ordinance became effective. And the right is not forfeited by a purchaser who takes with knowledge of the regulations which are inconsistent with the existing use." 83 Am. Jur. 2d Zoning and Planning, § 656, pp. 557-558 and cases cited therein (footnotes omitted.)

Although the above text does not cite any Michigan decisions, Michigan law is in accord with the rule that a subsequent owner has the constitutional right to continue a predecessor's non-conforming use of the purchased property. Redford Moving & Storage Co. v. City of Detroit, 336 Mich. 702, 711; 58 N.W. 2d 812 (1953).[2]

Unlike the property owner in Palazzolo, supra, Adams acquired an existing and lawful use of property. Although the Respondent had, by fiat, declared that use to

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[2] Adams I, supra, held that the instant Respondent had the implied statutory authority to eliminate the non-conforming signs. 439 Mich. at 219.

be nonconforming in 1975, that lawful nonconforming use ran with the real property owned by Adams' lessors. Consistent with Lucas' above admonition (approvingly cited in Palazzolo, supra), the instant Respondent is unable to eliminate Adams' right to continue to use the property without paying Adams just compensation. 505 U.S. at 1027.

Second, as a matter of fact, Adams had a distinct expectation that it would be allowed to continue to use the billboards in question. Both the general history of billboard jurisprudence within the State of Michigan, and in particular, the experiences of Adams' immediate predecessor, Central Advertising Company, demonstrate that Adams had a reasonable expectation that it could continue to use the rooftop leaseholds. Among other things, the following factors support this proposition:

- In 1937, the Michigan Supreme Court held that a city's police power authority to regulate billboards did not allow a city to terminate the use of a non-conforming billboard. Wolverine Sign Works v. City of Bloomfield Hills, 279 Mich. 205, 208; 271 N.W. 823 (1937);

- In 1972, three years before the Defendant adopted its ordinance, the Michigan Court of Appeals held that the City of Ann Arbor did not have a right to eliminate over time Central Advertising Company's non-conforming off-

premises billboards. Central Advertising Company v. Ann Arbor, 42 Mich. App. 59, 73; 201 N.W.2d 365 (1972).

- In 1974, more than a year before the Defendant adopted its ordinance and 13 years before its effective date, the Michigan Supreme Court affirmed the above Court of Appeals ruling, albeit on other grounds. Central Advertising Co. v. Ann Arbor, 391 Mich. 533; 218 N.W.2d 27 (1974).

- In April of 1975, the Washtenaw County Circuit Court reaffirmed its findings regarding the invalidity of the City of Ann Arbor's sign code. In June of 1975, the Michigan Supreme Court affirmed the Trial Court's ruling within the context of its prior holding. Central Advertising Co. v. Ann Arbor, 394 Mich. 943 (1975).

- Adams acquired its rooftop leaseholds from Central Advertising Company in 1983. It did so after many years of Michigan billboard jurisprudence had established the rights of a billboard owner. One of those owners was Adams' immediate predecessor (Central Advertising Company) and the party to whom the Defendant had issued permits and a license for the instant billboards.

Adams also had the legal right to expect that it could renew its leases with its lessors. Its Fifth Amendment-protected leasehold rights (see, General Motors and Petty Motor Co., supra), included its right to renew its leases. Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470; 93 S.Ct. 791; 35 L.Ed. 2d 1 (1973). Adams had a right to renew its leases in 1993 and 1996.

The relevant Michigan jurisprudential history applicable to the instant case, buttressed by this Court's decisions in, among others, General Motors, Petty Motors, and Almota Farmers Elevator & Warehouse, supra, demonstrates that Adams had a reasonable expectation that it would be allowed to continue to use the rooftop billboards. The right to use those lawful pre-existing structures ran with the land. This was part of Adams' "title," i.e., its "bundle" of rights. Adams had an expectation that it could use the billboards. For these reasons, Adams requests the Court to grant this Petition for Certiorari and reverse the decision of the Michigan Supreme Court.

CONCLUSION AND RELIEF REQUESTED

As demonstrated above, the Michigan Supreme Court's finding is clearly contrary to many of this Court's decisions. The Michigan Supreme Court did not merely misapply a properly stated rule of law. Rather, its

decision is clearly contrary to the Fifth Amendment's requirement that the Defendant must pay just compensation for the elimination of Adams' property rights. Adams requests the Court to grant its Petition for Certiorari, find that the enforcement of the Defendant's sign code is contrary to Adams' Fifth Amendment rights, and reverse the erroneous decision of the Michigan Supreme Court.

Respectfully submitted,

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No. _____

In the

Supreme Court of the United States

October Term, 2000

ADAMS OUTDOOR ADVERTISING,

Petitioner

v

CITY OF EAST LANSING,

Respondent

On Petition for Writ of Certiorari to the Supreme Court of the State of Michigan

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PETITIONER ADAMS OUTDOOR ADVERTISING'S APPENDIX

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A

ADAMS OUTDOOR ADVERTISING v CITY OF EAST LANSING (AFTER REMAND)

Docket No. 113674. Argued April 5, 2000 (Calendar No. 6). Decided July 26, 2000.

Adams Outdoor Advertising brought an action in the Ingham Circuit Court against the city of East Lansing, seeking declaratory and injunctive relief from enforcement of the city's sign ordinance. The court, Thomas L. Brown, J., granted partial summary disposition for the plaintiff, finding that the sign ordinance was enacted without legislative authority. The Court of Appeals, HOOD, P.J., and MAHER and CYNAR, JJ., affirmed in an unpublished opinion per curiam (Docket No. 110816). The Supreme Court reversed the decision of the Court of Appeals, finding that the city had the authority to enact its sign code, and remanded the case to the trial court to resolve whether enforcement of the sign code resulted in a taking without just compensation. 439 Mich 209 (1992). On remand, the circuit court ruled that, with regard to the plaintiff's rooftop leaseholds, enforcement of the sign code resulted in a taking without just compensation, depriving the plaintiff of all economically viable use of that property. The Court of Appeals, SAWYER, P.J., and MICHAEL J. KELLY and SMOLENSKI, JJ., affirmed. 232 Mich App 587 (1998) (Docket No. 200655). The city appeals.

In an opinion by Justice TAYLOR, joined by Justices CORRIGAN, YOUNG, and MARKMAN, the Supreme Court *held*:

Adams' leasehold interests did not include the right to display signs on rooftops after May 1, 1987. Accordingly, the sign code did not effect a taking of Adams' interests in its rooftop signs.

1. The sign code is a legitimate exercise of East Lansing's police power. Land use regulations effect a taking in two general situations: when they do not substantially advance a legitimate state interest and when they deny an owner economically viable use of land. Denial of an owner of economically viable use of land includes a categorical taking, where the owner is deprived of all economically beneficial or productive use of land, and a taking recognized on the basis of the application of the traditional "balancing test" established in *Penn Central Transportation Co v New York City*, 438 US 104 (1978). In applying the balancing test, a reviewing

court must engage in an ad hoc, factual inquiry, centering on the character of the government's action, the economic effect of the regulation on the property, and the extent by which the regulation has interfered with distinct, investment-backed expectations.

2. A lessor can transfer no greater rights than he possesses. Because, in this case the lessors never had an absolute right to display signs on the rooftops of their buildings, they had no right to prevent the imposition of regulations that represented reasonable exercises of the police power and that did not effect a taking. Thus, they could not convey to Adams an absolute right to display signs on the leased rooftops because they never possessed such a right. Accordingly, even before enactment of the sign code, the leases at issue did not include an absolute right to display signs on the rooftops. At most, they included a right to display signs on the rooftops subject to reasonable police power regulations that did not effect a taking of the lessors' interests.

3. Because the sign code does not deprive the lessors of all economically beneficial or productive use of land, it would not effect a categorical taking of the lessors' interests. Nor would it effect a taking under the three-part balancing test, i.e., it is a reasonable police power regulation, any economic effect would be limited because the rooftop is only a small portion of the lessors' property, and any interference would be limited because the rooftop is only a small portion of the lessors' property and because they never had an absolute right to display signs on the rooftop.

4. Adams was aware of the 1975 sign code and could have had no reasonable expectation that it could maintain the signs at the rooftop locations after the date designated in the code.

Justice KELLY, joined by Justice CAVANAGH, concurring, stated that the sign ordinance proscribing all rooftop billboards within the city limits does not result in a taking of the plaintiff's rooftop billboards. There has been no taking per se of the plaintiff's property, because the ordinance does not authorize the city to take title to or physically occupy the plaintiff's property. There has been no regulatory taking, because the plaintiff retains an economically beneficial use of its billboards. It had no protected right to continue to use its leaseholds to display rooftop billboards when those leases were entered into after the effective date of the ordinance. The majority's analysis is premised on the rights of the lessor who is not before the Court and whose rights were not litigated.

The United States and the Michigan Constitutions require a governmental entity to pay just compensation for any private property it takes for public use. Those prohibitions can be implicated by governmental regulation that overburdens private property, and

can result in a taking where the regulation does not substantially advance a legitimate state interest, or where it denies an owner economically viable use of his land.

The ordinance in this case bears on two property interests of the plaintiff: in its billboards and in the leaseholds on which its billboards are located. The interest in the billboards is an interest in personal property. The fact that they are affixed to rooftops of buildings does not bring them within the denomination of real estate. Rather, they are trade fixtures. The leases, however, are interests in real property.

The sign ordinance does not result in a regulatory taking. Where a proscribed use was not part of a property owner's title to begin with, there can be no taking of the property when the proscription is enforced. The plaintiff entered into the leases at issue after the effective date of defendant's sign ordinance with full knowledge that the ordinance prohibited billboards from being displayed on its rooftop location after May 1, 1987. The plaintiff never had the right, among its leasehold "bundle of rights," to display the rooftop billboards after that date. Nor can it be said that the plaintiff had an expectation that it could continue to renew its leases while defendant's ordinance was in effect. Under the circumstances presented, the plaintiff had no realistic expectancy that the leases it entered into after the effective date of defendant's ordinance would last their full term or be renewable.

Because the plaintiff entered into lease agreements with full knowledge that at anytime the city could enforce its sign code and render the leaseholds useless, it had no legitimate or reasonable investment-backed expectation in them. When the substantial economic effect on the plaintiff is balanced against the absence of any investment-backed expectation and the recognized social benefit of improving safety and aesthetics, the sign ordinance did not result in a taking of the plaintiff's leaseholds. Accordingly, no compensation is due the plaintiff for the regulatory effect of the sign ordinance on its leasehold interests.

Chief Justice WEAVER, concurring in the result, stated that the Supreme Court has failed to give due consideration to the private property interests related to billboard ownership and leases.

The rooftop billboards preexisted the 1975 ordinance and became nonconforming uses after the ordinance's enactment. A prior nonconforming use is a vested right in the use of particular property that does not conform to zoning restrictions, but is protected because it lawfully existed before the zoning regulation's effective date. Even if an ordinance is reasonable, it cannot operate to oust a property owner from a vested right.

Wolverine Sign Works v Bloomfield Hills, 279 Mich 205 (1937), recognized that billboard regulation could run afoul of the prohibition against taking private property without just compensation.

Adams Outdoor Advertising v East Lansing, 439 Mich 209 (1992), held that the City of East Lansing had the power to forcibly terminate nonconforming billboards and signs over a reasonable period of time. The implication of the reasonable period of time proviso of the holding is that, on its face, the ordinance effected a taking. While the Court remanded to consider the compensating effect of amortization, the effect of amortization would not change the nature of the underlying governmental action.

Reversed and remanded.

Fraser, Trebilcock, Davis & Foster, P.C. (by *Michael H. Perry*), for plaintiff-appellee.

McGinty, Jakubiak, Frankland & Hitch, P.C. (by *Thomas M. Hitch*), for defendant-appellant.

Amici Curiae:

Jennifer M. Granholm, Attorney General, *Thomas L. Casey*, Solicitor General, *A. Michael Leffler*, Assistant Attorney General in Charge, and *S. Peter Manning*, Assistant Attorney General, for the Attorney General.

Bodman, Longley & Dahling, L.L.P. (by *James J. Walsh*), for Michigan Chamber of Commerce and Outdoor Advertising Association of Michigan.

Secrest, Wardle, Lynch, Hampton, Truex & Morley (by *Gerald A. Fisher* and *Thomas R. Schultz*) for Michigan Municipal League.

McClelland & Anderson, L.L.P. (by *Gregory L. McClelland, Kelly A. Myers*, and *Marc D. Matlock*), for Small Business Association of Michigan.

Plunkett & Cooney, P.C. (by *Mary Massaron Ross*), for American Planning Association.

John F. Rohe; and *John T. Bagg* and *John D. Echeverria*, of counsel, for Scenic America and Scenic Michigan.

TAYLOR, J. At issue is whether application of East Lansing's sign code to Adams Outdoor Advertising's rooftop signs effects a taking. The trial court and Court of Appeals concluded that the code resulted in a taking with respect to Adams' rooftop signs. We reverse.

In 1975, East Lansing adopted its current sign code. As pertinent to this appeal, the code prohibited rooftop signs. Subsection 8.38(12). The code's amortization provision required removal of nonconforming signs by May 1, 1987. Subsection 8.39(8).

Adams acquired Central Advertising in 1983. It renewed the leases associated with the off-premises rooftop signs at issue several times after the enactment of the 1975 sign code, most recently in 1993 and 1996.

Adams and other entities (who had nonconforming on-premises signs) sued East Lansing for relief from denial of their requests for variances from the sign code. The trial court granted plaintiffs' motion for summary disposition on the basis that East Lansing lacked statutory authority for the code's amortization provision. The Court of Appeals affirmed. Unpublished opinion per curiam, issued April 20, 1990 (Docket No. 110816). This Court reversed, holding that East Lansing has authority under the home rule act to regulate signs, including eliminating nonconforming signs through the use of an amortization provision. 439 Mich 209, 219; 483 NW2d 38 (1992) *(Adams I)*. We remanded this matter to the trial court

to determine whether application of the code to the signs at issue effected a taking.

On remand, the trial court concluded that application of the sign code to Adams' rooftop signs and to certain of its freestanding signs effected a taking.[1] The Court of Appeals affirmed regarding the rooftop signs, but reversed and remanded regarding the freestanding signs. 232 Mich App 587; 591 NW2d 404 (1998). This appeal relates only to the application of the sign code to the rooftop signs.

In *Adams I*, this Court concluded:

> We are simply holding that the amortization provision of the East Lansing sign code is a police power ordinance, properly enacted under MCL 117.4i(5); MSA 5.2082(5), that enables cities the authority to regulate signs and billboards in the interest of the health, safety, and welfare of the community and to promote the aesthetic value of the city. [439 Mich 218, n 14.]

It is therefore established that the code is a legitimate exercise of East Lansing's police power. The only question is whether this regulation goes so far as to result in a taking.[2]

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[1] East Lansing entered into a consent judgment with the other plaintiffs; accordingly, Adams was the only remaining plaintiff on remand.

[2] We point out that there is no issue regarding nonconforming use because nonconforming use analysis only applies in the context of zoning regulations. *Adams I* held that the sign code is not a zoning regulation, but a police power regulation in the interest of public health and safety. Accordingly, nonconforming use analysis is inapposite here. To understand this distinction (that nonconforming use analysis applies only to zoning regulations and not to public health and safety regulations), one need only consider the unprecedented handcuffing of the government that would ensue if public health and safety regulations were subject to nonconforming use analysis. This would leave governments powerless to immediately terminate existing hazardous or dangerous activities because any preexisting facility engaged in these activities would be able to claim

US Const, Am V and Const 1963, art 10, § 2 prohibit the taking of private property for public use without just compensation. Drawing on United States Supreme Court precedent, this Court recently reiterated the appropriate analyses for determining whether a taking has occurred in *K & K Construction, Inc v Dep't of Natural Resources*, 456 Mich 570; 575 NW2d 531 (1998). The *K & K* Court noted that land use regulations effect a taking in two general situations: when they do not substantially advance a legitimate state interest or when they deny an owner "economically viable use of his land." *Id.* at 576. It then differentiated the second type of taking further at 576-577:

> The second type of taking, where the regulation denies an owner of economically viable use of land, is further subdivided into two situations: (a) a "categorical" taking, where the owner is deprived of "all economically beneficial or productive use of land," *Lucas v South Carolina Coastal Council*, 505 US 1003, 1015; 112 S Ct 2886; 120 L Ed 2d 798 (1992); or (b) a taking recognized on the basis of the application of the traditional "balancing test" established in *Penn Central Transportation Co v New York City*, 438 US 104; 98 S Ct 2646; 57 L Ed 2d 631 (1978).

It defined categorical takings at 577:

> In the former situation, the categorical taking, a reviewing court need not apply a case-specific analysis, and the owner should automatically recover for a taking of his property. *Lucas*, *supra* at 1015. A person may recover for this type of taking in the case of a physical invasion of his property by the government (not at issue in this case), or

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nonconforming use status and continue indefinitely in spite of the regulation.

> where a regulation forces an owner to "sacrifice *all* economically beneficial uses [of his land] in the name of the common good . . . ." *Id.* at 1019 (emphasis in original).

Next, it explained the balancing test analysis at 577:

> In the latter situation, the balancing test, a reviewing court must engage in an "ad hoc, factual inquir[y]," centering on three factors: (1) the character of the government's action, (2) the economic effect of the regulation on the property, and (3) the extent by which the regulation has interfered with distinct, investment-backed expectations. *Penn Central*, 438 US 124.

However, before we apply these tests, there is a preliminary question: does the claimant possess the interest that he alleges is being taken by the regulation? Here, the Court of Appeals clarified that Adams' theory at trial was that the sign code effected a taking of its real property interests in the rooftop leaseholds. 232 Mich App 596. As a lessee, Adams' property interest rights are limited to the rights possessed by the lessors, i.e., the owners of the buildings who leased the two rooftop sites at issue to Adams.[3] It is fundamental property law that a lessor can transfer no greater rights than he possesses. See, e.g., *McMillan v Mich S & N I R R Co*, 16 Mich 79 (1867). Here, the lessors never had an *absolute* right to display signs on the rooftops of their buildings. They had no right to prevent the imposition of regulations that represented reasonable exercises of the police power and that did

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[3] We analyze the interests of the lessors (who are not parties to this matter) solely to determine the interests of Adams, the lessee and plaintiff-appellee in this matter.

not effect a taking.[4] Thus, they could not convey to Adams an absolute right to display signs on the leased rooftops because they never possessed such a right in the first place. Accordingly, even before enactment of the sign code, the leases at issue did not include an absolute right to display signs on the rooftops. At most, the leases included a right to display signs on the rooftops subject to reasonable police power regulations that did not effect a taking of the lessors' interests.

A property owner cannot determine the efficacy of a regulation by the manner in which he structures leases of his property. For example, a property owner, with respect to whom a particular regulation would not constitute a taking, cannot transform such regulation into a taking simply by transferring a narrow parcel or interest in his property to a lessee.[5] Under the constitution, we do not believe that a property owner, confronted with an imminent property regulation, can nullify such a legitimate exercise of the police power by leasing narrow parcels or interests in his property so that the regulation could be characterized as a taking only because of its disproportionate effect on the narrow parcel or interest leased.

Here, East Lansing enacted a sign code in 1975. As noted above, this Court has previously concluded that the code represents a valid exercise of East Lansing's

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[4] Note that in order to demonstrate a taking with respect to the lessors, the relevant parcel for analysis would be the lessors' entire property interest, i.e., the building and grounds, not just the portion of the rooftop that was leased to Adams.

[5] We do not address here the situation in which a property owner transfers an ownership interest, as opposed to a lease interest, in property.

police power. 439 Mich 218, n 14. The code's provision prohibiting rooftop signs only removes one "stick" from the lessors' total "bundle" of rights in their property because the vast majority of the lessors' property is unaffected by this provision. Because this provision does not deprive the lessors of "all economically beneficial or productive use of land," it would not effect a categorical taking of the lessors' interests. Nor would it effect a taking under the three-part balancing test. Regarding factor 1 (the character of the government's action), this Court has concluded that the code is a reasonable police power regulation. Regarding factor 2 (the economic effect of the regulation on the property), any economic effect would be limited because the rooftop is only a small portion of the lessors' property. Regarding factor 3 (interference with investment-backed expectations), any interference would be limited because the rooftop is only a small portion of the lessors' property and because they never had an *absolute* right to display signs on the rooftop. For these reasons, the provision of the code prohibiting rooftop signs would not effect a taking of the lessors' interests under either the categorical test or the balancing test.[6] Thus, the lessors would have had no right to display a sign on their roof after the May 1, 1987, date designated in the code and would have had no valid claim that the code effected a taking. Adams can possess no greater rights under the lease than the lessors possessed. Accordingly, Adams has no right to display signs in contravention of the code and has no valid claim that

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[6] During oral argument, Adams conceded that the lessors may not have a taking claim.

the code effected a taking of its interest in the rooftop leases.

Further, Adams acquired the rooftop signs and leases at issue in 1983 and renewed the leases as recently as 1993 and 1996. In 1983, 1993, and 1996, Adams was aware of the 1975 sign code[7] and could have had no reasonable expectation that it could maintain the signs at the rooftop locations after the date designated in the code. Under these circumstances, Adams' property interests in the leases clearly did not include a right to display signs on a rooftop after May 1, 1987.[8]

For these reasons, we conclude that Adams' leasehold interests did not include the right to display signs on rooftops after May 1, 1987. Accordingly, the sign code did not effect a taking of Adams' interests in its rooftop signs. We reverse the Court of Appeals decision, which concluded otherwise. We instruct the trial court to conduct its proceedings regarding Adams' freestanding signs in accordance with this opinion.

CORRIGAN, YOUNG, and MARKMAN, JJ., concurred with TAYLOR, J.

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[7] People are presumed to know the law. *Mudge v Macomb Co*, 458 Mich 87, 109, n 22; 580 NW2d 845 (1998). Moreover, Adams received personal notice in the form of February 1987 notices from East Lansing instructing Adams to remove its nonconforming rooftop signs by May 1, 1987, as required by the sign code.

[8] Moreover, to the extent that Adams might be interpreted as making a taking claim with respect to its personal property interests in the signs, such a claim fails. The code forbids displaying signs on rooftops, but it does not confiscate Adams' existing signs or appropriate them for public use. They are still available for use in other locations. Thus, application of the code to the rooftop signs obviously does not effect a taking of the signs themselves.

KELLY, J. (*concurring*). In this taking case, defendant, the city of East Lansing, appeals from a Court of Appeals decision affirming the trial court in part and reversing it in part in favor of plaintiff, Adams Outdoor Advertising. The issue is whether defendant's sign ordinance resulted in a regulatory taking of plaintiff's billboards and rooftop leaseholds.

I would reverse the Court of Appeals decision insofar as it holds that defendant's sign ordinance resulted in a taking and reverse the trial court order granting compensation to plaintiff. I write separately because I disagree with the majority's analysis. It is premised on the rights of the lessor who is not before the Court and whose rights were not litigated.

BACKGROUND

This dispute concerns rooftop billboards at two different locations in East Lansing. Plaintiff owns the billboards and leases the rooftop locations where they are installed. The billboards were erected in 1968 and 1955, respectively. The leases at issue in this dispute were entered into in 1996 and 1993.

In 1975, defendant enacted a new ordinance to regulate signs and billboards throughout the city. The ordinance made plaintiff's rooftop billboards nonconforming and prohibited plaintiff from displaying them after May 1, 1987.[1]

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[1] The ordinance stated at § 8.39:

> Any existing sign on the effective date of this Chapter or any amendment hereto, which does not at that time comply with all of the provisions here, including any amendment
>
> * * *

In 1987, defendant advised plaintiff that it would enforce its sign ordinance. After exhausting its appeals with defendant, plaintiff initiated this action seeking declaratory and injunctive relief. The trial court granted plaintiff's motion for partial summary disposition, finding that the sign ordinance was enacted without legislative authority. Defendant appealed, and the Court of Appeals affirmed.

This Court reversed the decision of the Court of Appeals, finding that the city had the authority to enact its sign code. The Court remanded the case to the trial court to resolve the issue whether enforcement of the sign code resulted in a taking without just compensation. 439 Mich 209; 483 NW2d 38 (1992).

On remand, the circuit court ruled that, with regard to the rooftop leaseholds, enforcement of the sign code resulted in a taking without just compensation. It reasoned that plaintiff was deprived of all economically viable use of that property. The Court of Appeals affirmed. 232 Mich App 587; 591 NW2d 404 (1998).[2]

Shall not be placed, maintained, or displayed by any person on or after May 1, 1987.

[2] Several freestanding billboards owned by plaintiff and located on land owned by plaintiff had also been the subject of the litigation up to this point. The trial court found that defendant's ordinance resulted in a taking of the freestanding billboards, as well. The Court of Appeals reversed the trial court's decision with regard to the freestanding billboards. It found that all economic use of the property was not foreclosed, because defendant's ordinance did not prohibit plaintiff from displaying all its billboards at that location. There is no issue before this Court regarding the freestanding billboards. We proceed to consider defendant's appeal from the Court of Appeals finding that defendant's ordinance resulted in a taking of plaintiff's rooftop billboards.

ANALYSIS

I

The issue is whether a regulatory taking has occurred that requires defendant to compensate plaintiff when defendant's sign ordinance prohibits plaintiff from using its existing rooftop billboards. The federal constitution and the Michigan Constitution require a governmental entity to pay just compensation for any private property it takes for public use. US Const, Am V;[3] Const 1963, art 10, § 2.[4]

Those constitutional prohibitions against taking private property without just compensation can be implicated by governmental regulation that overburdens private property. We have held that such regulation can result in a taking in two general situations:

> (1) where the regulation does not substantially advance a legitimate state interest, or (2) where the regulation denies an owner economically viable use of his land. *Keystone Bituminous Coal Ass'n v DeBenedictis*, 480 US 470, 485; 107 S Ct 1232; 94 L Ed 2d 472 (1987).
>
> The second type of taking, where the regulation denies an owner of economically viable use of land, is further subdivided into two situations: (a) a "categorical" taking, where

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[3] The Fifth Amendment to the United States Constitution provides: "nor shall private property be taken for public use, without just compensation." The Fifth Amendment is applicable to the states through the Fourteenth Amendment. *Penn Central Transportation Co v New York City*, 438 US 104, 122; 98 S Ct 2646; 57 L Ed 2d 631 (1978).

[4] Const 1963, art 10, § 2 provides:

> Private property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law. Compensation shall be determined in proceedings in a court of record.

the owner is deprived of "all economically beneficial or productive use of land," *Lucas v South Carolina Coastal Council*, 505 US 1003, 1015; 112 S Ct 2886; 120 L Ed 2d 798 (1992); or (b) a taking recognized on the basis of the application of the traditional "balancing test" established in *Penn Central Transportation Co v New York City*, 438 US 104; 98 S Ct 2646; 57 L Ed 2d 631 (1978).

In the former situation, the categorical taking, a reviewing court need not apply a case-specific analysis, and the owner should automatically recover for a taking of his property. *Lucas*, *supra* at 1015. A person may recover for this type of taking in the case of a physical invasion of his property by the government . . . , or where a regulation forces an owner to "sacrifice *all* economically beneficial uses [of his land] in the name of the common good . . . ." *Id.* at 1019 (emphasis added). In the latter situation, the balancing test, a reviewing court must engage in an "ad hoc, factual inquir[y]," centering on three factors: (1) the character of the government's action, (2) the economic effect of the regulation on the property, and (3) the extent by which the regulation has interfered with distinct, investment-backed expectations. *Penn Central* [*supra* at] 124. [*K & K Construction v Dep't of Natural Resources*, 456 Mich 570, 576-577; 575 NW2d 531 (1998).]

A

Before determining whether a compensable taking has occurred, we must first classify the property rights under consideration. The Court of Appeals found them to constitute real property. It stated:

[A] review of the record makes it abundantly clear that this case was tried on the theory that the property interests claimed to have been taken by East Lansing's sign code are Adams' real property interests, whether leasehold or fee simple, in the places where its billboards are located. East Lansing's argument that no taking occurred because the billboards are personal property misapprehends the nature

of the property interest claimed to have been taken in this case and is therefore rejected. [232 Mich App 596.]

Plaintiff asserts that defendant's sign ordinance results in a taking of its billboards and also interferes with its leaseholds on which its billboards are attached. Defendant continues to argue that its sign ordinance is directed solely toward plaintiff's personal property, its billboards. Defendant points out that, unlike the city's action in *In re Acquisition of Billboard Leases & Easements*[5] where the city condemned leaseholds on which billboards were located, its ordinance does not condemn any real property. It regulates only the placement of billboards.

I find that defendant's ordinance comes to bear on two different property interests of plaintiff: plaintiff's property interest in its billboards and also plaintiff's property interest in the leaseholds on which its billboards are located.

I proceed without considering defendant's arguments regarding the proper "denominator parcel" to use. Those arguments were first raised in the Court of Appeals, so they are unpreserved for our review. *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993). Furthermore, consideration of the issue is an inherently factual inquiry that falls within the province of the trial court. *K & K Construction*, *supra* at 580. Thus, I concentrate my focus on the specific billboards and leaseholds at issue.

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[5] 206 Mich App 669; 517 NW2d 872 (1994).

1

Plaintiff's interest in its billboards is an interest in personal property. Personal property is broadly defined as

> everything that is subject of ownership, not coming under denomination of real estate. A right or interest in things personal, or right or interest less than a freehold in realty, or any right or interest which one has in things movable. [Black's Law Dictionary (6th ed), p 1217; see also *City of Holland v Fillmore Twp*, 363 Mich 38, 42; 108 NW2d 840 (1961).]

The fact that plaintiff's billboards are affixed to the rooftops of the buildings on which they are located does not bring them within the "denomination of real estate." I agree with the recent Court of Appeals decision in *Outdoor Systems Advertising, Inc v Korth*,[6] holding that a lessee's billboards located on a rooftop are trade fixtures, and trade fixtures are the personal property of the lessee. Accordingly, I would hold that plaintiff's billboards are personal property.

2

Plaintiff's other property interest affected by defendant's sign ordinance is its rooftop leases. We have previously determined that leases are interests in real property. See *Fidelity Trust Co v Wayne Co*, 244 Mich 182; 221 NW 111 (1928).

Plaintiff leased the rooftops for the sole purpose of mounting its billboards upon them. Defendant's ordinance prohibits rooftop billboards. Thus, defendant's

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[6] 238 Mich App 664, 667; 607 NW2d 729 (1999).

ordinance has rendered plaintiff's leases useless, adversely affecting plaintiff's real property interest in them.

B

Having defined the property rights,[7] I consider whether defendant's sign ordinance was a taking of plaintiff's personal property interest in its billboards or its real property interest in its leaseholds. First, we analyze plaintiff's personal property interest in its billboards.

Defendant's ordinance did not result in a regulatory taking of plaintiff's billboards. " '[T]he

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[7] This is an important issue over which both the majority and Chief Justice WEAVER in her concurrence stumble. The majority relies on an analysis of the property owner's rights to determine that no taking has occurred. The problem with it is that the property owner is not and has not been a party to this dispute.

Chief Justice WEAVER as well fails adequately to identify the property interests at issue. She refers to the plaintiff's billboards and leaseholds as nonconforming uses that became vested rights when they preexisted defendant's sign ordinance. However, she fails to recognize that the leases in effect at the time defendant's ordinance was enacted or became effective had long since expired when plaintiff initiated this suit. She also fails to recognize that the billboards at issue are the personal property of plaintiff. Her analysis of a vested nonconforming land use does not apply to them because plaintiff has no real property interest to which the billboards are attached.

Plaintiff is before the Court as a lessee. "A lease is a conveyance by the owner of an estate of a portion of the interest therein to another for a term less than his own for a valuable consideration." *De Bruyn Produce Co v Romero*, 202 Mich App 92, 98; 508 NW2d 150 (1993). Accordingly, plaintiff's real property interest is limited to the duration of its lease. A lessee does not stand in the shoes of or have rights identical to those of a real property owner that might be entitled to continue a nonconforming use indefinitely. Thus, the questions relevant to this case are whether plaintiff had a vested right to renew its nonconforming leasehold interests. Also, did defendant's ordinance result in a taking of plaintiff's personal property, the billboards, or plaintiff's real property interest, its leaseholds. Those are the issues properly before the Court and which I consider in resolving this case.

general . . . rule is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.' " *K & K Construction*, *supra* at 576, quoting *Pennsylvania Coal*, *supra* at 415. That same principle applies to the regulation of personal property. See *Andrus v Allard*, 444 US 51; 100 S Ct 318; 62 L Ed 2d 210 (1979).

I see no need to perform an extended analysis of whether a regulatory taking sufficient to require compensation has occurred. Defendant's ordinance prohibits plaintiff from displaying its billboards from only two rooftop locations. As such, it affects merely one "strand" of plaintiff's "bundle" of rights in its billboards. Plaintiff is free to move the billboards elsewhere and continue to use them for its economic benefit. Significantly, plaintiff remains free to possess and transfer its billboards. See *Andrus*, *supra* at 66.

The fact that a substantial effort may be involved in removing and relocating the billboards does not result in a taking. See *Outdoor Systems Advertising*, *supra* at 671-672, citing *Wentworth v Process Installations, Inc*, 122 Mich App 452, 465; 333 NW2d 78 (1983).[8] Therefore, I would hold that defendant's sign ordinance does not go so far as to result in a taking of plaintiff's billboards.

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[8] As demonstrated above, plaintiff's billboards are trade fixtures. The Superior Court in *Cameron v Oakland Co Gas & Oil Co*, 277 Mich 442, 459-460; 269 NW 227 (1936), stated:

> Indeed, it is difficult to conceive that any fixture, however solid, permanent, and closely attached to the realty, placed there for the sole purpose of trade, may not be removed at the end of the term.

Thus, plaintiff's billboards remain personal property that plaintiff can remove. Defendant's ordinance does not take the billboards merely because it prohibits plaintiff from using them where they are currently located.

C

1

Neither does defendant's sign ordinance result in a regulatory taking of plaintiff's leaseholds. "[E]ven if a regulation denies a landowner all economically productive use of the land, there is no compensable taking unless the landowner's 'bundle of rights' previously included the right to engage in the restricted activity." *Outdoor Graphics, Inc v City of Burlington*, 103 F3d 690, 694 (CA 8, 1996). Thus, where the proscribed use was not part of a property owner's title to begin with, there can be no taking of the property when the proscription is enforced. *Lucas*, *supra* at 1027.

In *Outdoor Graphics*, the defendant's sign ordinance prohibited billboards in residential areas. *Id.* at 692. The plaintiff's billboards were erected before the sign ordinance was enacted but, at the time the plaintiff purchased them, they already constituted nonconforming uses under the defendant's zoning code. *Id.* Thus, when the defendant required the plaintiff to remove them, compensation was not due because the plaintiff had never included in its "bundle of rights" the right to display the billboards. *Id.* at 694. The use of the billboards was illegal when the plaintiff purchased them. *Id.*

Here, plaintiff entered into the leases at issue after the effective date of defendant's sign ordinance. Upon entering into these leases, plaintiff had full knowledge that the ordinance prohibited billboards from being displayed on its rooftop location after May 1, 1987. Plaintiff never had the right, among its leasehold

"bundle of rights," to display the rooftop billboards after that date. Thus, defendant's sign ordinance takes something that plaintiff never had. In such a situation, there is no categorical taking. See *Outdoor Graphics*, *supra* at 694. See also *Loveladies Harbor, Inc v United States*, 28 F3d 1171, 1177 (CA Fed, 1994).[9]

Plaintiff argues, however, that the Court must consider its expectation that it would renew its leases. In certain instances, the expectation of future lease renewals is considered in a taking analysis. See *Almota Farmers Elevator & Warehouse Co v United States*, 409 US 470; 93 S Ct 791; 35 L Ed 2d 1 (1973).

Here, however, plaintiff entered into its current leases for the rooftops *after* defendant's sign ordinance had gone into effect. That fact distinguishes this case from *Almota*, where the government sought to condemn a leasehold interest that had arisen before condemnation proceedings began and ran for another 7½ years. See *Almota*, *supra* at 471.

It cannot be said that plaintiff had an expectation that it could continue to renew its leases while defendant's ordinance was in effect. Under the circumstances presented, plaintiff had no realistic expectancy that the leases it entered into after the effective date of defendant's ordinance would last their full term or be renewable. Thus, I do not find

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[9] The federal circuit court of appeals stated:

> [T]he owner who bought with knowledge of the restraint could be said to have no reliance interest, or to have assumed the risk of any economic loss. In economic terms, it could be said that the market had already discounted for the restraint, so that purchaser could not show a loss in his investment attributable to it.

that plaintiff's asserted expectancy of lease renewals is a protected legal right.[10]

2

Having found no categorical taking of plaintiff's leasehold interests, I next examine whether there was a compensable taking pursuant to the balancing test outlined in *Penn Central, supra*. That test requires me to consider 1) the economic effect of the regulation on plaintiff, 2) the extent to which that regulation has interfered with distinct, investment-backed expectations, and 3) the character of the government regulation. *Penn Central, supra* at 124.

There is no set formula for determining whether a taking has occurred under the balancing test. *K & K Construction, supra* at 588. However, I will first consider whether plaintiff had any distinct, investment-backed expectations in its leaseholds.

Here, plaintiff never had a legitimate expectation that its leaseholds or billboards would continue to produce income in perpetuity. The fact that plaintiff continued to invest in new leaseholds after defendant enacted its sign ordinance does not compel this Court to find a taking. Plaintiff was well aware that the enforcement of defendant's sign code could, at any time, render its leasehold interests worthless.[11]

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[10] Accordingly, it is unnecessary to consider whether Michigan recognizes reasonable amortization periods as a method to preclude a taking.

[11] Plaintiff is presumed to have known the law. See *Mudge v Macomb Co*, 458 Mich 87, 109, n 22; 580 NW2d 845 (1998). Moreover, plaintiff received personal notice in the form of February 1987 notices from defendant instructing plaintiff to remove its nonconforming rooftop signs by May 1, 1987, as required by the sign ordinance.

Plaintiff argues that several Michigan cases gave it the expectation that, if challenged, defendant's sign ordinance would be struck down or defendant would be required to pay plaintiff just compensation. See *Central Advertising Co v City of Ann Arbor*, 391 Mich 533; 218 NW2d 27 (1974); *Wolverine Sign Works v Bloomfield Hills*, 279 Mich 205; 271 NW 823 (1937). The court in *Naegele Outdoor Advertising v City of Durham*[12] addressed this issue directly:

> "A person who purchases land with notice of statutory impediments to the right to develop that land can justify few, if any, legitimate investment-backed expectations of development rights which rise to the level of constitutionally protected property rights . . . the state cannot be the guarantor by inverse condemnation proceedings, of the investment risk which people choose to take in the face of statutory or regulatory impediments." *Claridge v New Hampshire Wetlands Bd*, 125 NH 745 [750], 485 A2d 287, 291 (1984) . . . . This is especially true in the case of . . . leases for sign locations. [*Id.* at 1079.]

I agree with the *Naegele* court that constitutional protections are not meant to insure risky investments. Here, plaintiff entered into lease agreements with full knowledge that at anytime defendant could enforce its sign code and render the leaseholds useless. Plaintiff had no legitimate or reasonable investment-backed expectation in them.

Turning to the character of the governmental regulation, defendant's ordinance constitutes an outright ban on rooftop billboard advertising. Courts, however, have recognized the social benefits that such bans promote. See *Outdoor Graphics*, *supra* at 695.

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[12] 803 F Supp 1068 (MD NC, 1992).

The United States Supreme Court cited aesthetic or safety reasons to justify the prohibition of billboards. *Metromedia, Inc v San Diego*, 453 US 490, 512; 101 S Ct 2882; 69 L Ed 2d 800 (1981). Therefore, I find that the character of the governmental regulation "tilts the scales" even further toward a finding that no taking has occurred.

I realize that the economic effect on the plaintiff in this case is substantial because defendant's ordinance precludes plaintiff from using its leaseholds. I balance that fact against the absence of any investment-backed expectation and the recognized social benefit of improving safety and aesthetics. I conclude that defendant's sign ordinance did not result in a taking of plaintiff's leaseholds. Accordingly, no compensation is due plaintiff for the regulatory effect of defendant's sign ordinance on its leasehold interests.[13]

CONCLUSION

I would hold that defendant's sign ordinance proscribing all rooftop billboards within defendant's city

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[13] Chief Justice WEAVER, in her concurrence, states that *Wolverine Sign Works v Bloomfield Hills*, 279 Mich 205; 271 NW2d 823 (1937), "recognized that billboard regulation could run afoul of the prohibition against taking private property without just compensation." While I agree that there are certain instances where billboard regulation could result in a taking, *Wolverine* does not stand for that proposition.

The Court in *Wolverine* struck down a city ordinance that regulated billboard maintenance. *Id.* at 208. It did not, however, perform a taking analysis. *Id.* Instead, it relied on its finding that the city's ordinance vested a municipal officer with the power to *arbitrarily* limit the use of billboards through a permit process. *Id.* The Court expressly recognized that billboards may be prohibited pursuant to zoning regulations to promote the public health, safety and general welfare. *Id.* Thus, if relevant to this case at all, *Wolverine* supports my holding that no taking occurred. Defendant's sign ordinance did not vest any type of arbitrary authority in the city or in any of its employees.

limits does not result in a taking per se of plaintiff's rooftop billboards. There has been no per se taking of plaintiff's property, because defendant's ordinance does not authorize defendant to take title to or physically occupy plaintiff's property. There has been no regulatory taking, because plaintiff retains an economically beneficial use of its billboards. It had no protected right to continue to use its leaseholds to display rooftop billboards when those leases were entered into after the effective date of defendant's ordinance.

Defendant's sign ordinance did not result in a taking of plaintiff's rooftop billboards or leaseholds that requires just compensation. Accordingly, I would reverse the Court of Appeals decision to the contrary and would vacate the trial court order granting compensation to plaintiff for the taking of its rooftop billboards.

CAVANAGH, J., concurred with KELLY, J.

WEAVER, C.J. I concur in the result only of the majority opinion. I am concerned that this Court has failed to give due consideration to the private property interests related to billboard ownership and leases.

The roof top billboards at issue were constructed in 1955 and 1968. They, and the leases for their use, preexisted the 1975 ordinance and became nonconforming after the ordinance's enactment. "A prior nonconforming use is a vested right in the use of particular property that does not conform to zoning restrictions, but is protected because it lawfully existed before the zoning regulation's effective date." *Heath Twp v Sall*, 442 Mich 434, 439; 502 NW2d 627

(1993). "Though the ordinance be reasonable, it cannot operate to oust the property owner of his vested right." *Dusdal v City of Warren*, 387 Mich 354, 359-360; 196 NW2d 778 (1972). Specifically, in *Wolverine Sign Works v Bloomfield Hills*, 279 Mich 205, 208; 271 NW 823 (1937), this Court held that while billboards were subject to reasonable regulation, a city may not destroy, by a billboard maintenance ordinance, the property right in a lease use. In other words, *Wolverine* recognized that billboard regulation could run afoul of the prohibition against taking private property without just compensation.

In *Adams Outdoor Advertising v East Lansing*, 439 Mich 209; 483 NW2d 38 (1992) *(Adams I)*, this Court held that the City of East Lansing had the power to "forcibly *terminate* nonconforming billboards and signs over a reasonable period of time." *Id.* at 212 (emphasis added). The implication of the "reasonable period of time" proviso of this holding is that, on its face, the ordinance effected a taking. The Court remanded to consider the compensating effect of amortization. However, the effect of amortization would not change the nature of the underlying governmental action.

B

Order

Michigan Supreme Court
Lansing, Michigan

Entered:
September 19, 2000

6 Apr 2000

Rehearing No. 453

Elizabeth A. Weaver,
Chief Justice
Michael F. Cavanaugh
Marilyn Kelly
Clifford W. Taylor
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman,
Justices

ADAMS OUTDOOR ADVERTISING,

Plaintiff-Appellee,

v

SC: 113674
COA: 200655
Ingham CC: 87-059541-CZ

CITY OF EAST LANSING,

Defendant-Appellant.

In this cause, a motion for rehearing is considered, and it is hereby DENIED.

The motion to add to the record is DENIED.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

September 19, 2000 /S/
Clerk

C

ADAMS OUTDOOR ADVERTISING v CITY OF EAST LANSING

Docket No. 200655. Submitted May 5, 1998, at Grand Rapids. Decided November 20, 1998, at 9:20 A.M. Leave to appeal sought.

Adams Outdoor Advertising and others brought an action in the Ingham Circuit Court against the city of East Lansing, seeking declaratory and injunctive relief with regard to a provision of the city's sign code that required the removal of nonconforming signs within a specified amount of time and did not provide for the payment of any compensation to Adams for the removal of its nonconforming signs. The court, Thomas L. Brown, J., granted Adams' motion for partial summary disposition, finding that the contested provision was enacted without legislative authority. The city appealed and the Court of Appeals affirmed in an unpublished opinion per curiam, decided April 20, 1990 (Docket Nos. 110816-110818). The Supreme Court reversed the decision of the Court of Appeals, finding the city had the authority to enact its sign code, including the disputed provision. The Court remanded the matter to the trial court to resolve the issue whether the enforcement of the provision resulted in a taking without just compensation. 439 Mich 209 (1992). On remand, the court ruled that, with regard to Adams' billboards located on rooftop leaseholds, the enforcement of the provision resulted in a taking because Adams was deprived of all economically viable use of the property. With respect to the freestanding billboards in dispute that are located on property owned by Adams, the court ruled that there was a taking and permanently enjoined the city from enforcing the disputed provision against Adams. The court determined the amount of Adams' loss with respect to both the rooftop and freestanding billboards. The city appealed.

The Court of Appeals *held*:

1. The property interests involved in this matter, whether leasehold or fee simple, are real property interests.

2. Even though the city has the legislative authority to enact its sign code and even though the sign code has a valid police power purpose, if the code goes too far in regulating Adams' use of its real property, a taking for which compensation is due will be recognized.

3. As applied to Adams' billboards, the enforcement of the disputed provision constitutes a taking regardless of whether Adams was given a reasonable time to comply with the code and recover a substantial return on its investment.

4. It is realistic and fair to consider each of Adams' real property interests separately for purposes of the taking analysis.

5. The court properly found that the disputed provision, as applied to Adams' rooftop leaseholds, constituted a categorical taking that deprived Adams of all economically beneficial use of the leasehold. The city does not dispute the method used to value the rooftop leaseholds. The order of the trial court must be affirmed with respect to the rooftop billboards.

6. The court, for purposes of determining whether the enforcement of the disputed provision with regard to the freestanding billboards constituted a taking, should have engaged in an ad hoc factual inquiry centering on three factors: the character of the government's action, the economic effect of the regulation on the property, and the extent by which the regulation has interfered with distinct investment-backed expectations. The question whether the regulation denies the owner economically viable use of the land requires at least a comparison of the value removed with the value that remains. The court considered only the second factor, and only in a limited manner, and made a finding regarding the value removed but not the value remaining.

7. The order with respect to the freestanding billboards must be reversed and the matter must be remanded for a calculation of the value remaining and a reevaluation of the taking claim under the three-part balancing test.

Affirmed in part, reversed in part, and remanded.

1. CONSTITUTIONAL LAW — MUNICIPAL CORPORATIONS — LAND USE REGULATIONS — TAKINGS — COMPENSATION.

A taking may be found where a land use regulation denies an owner economically viable use of the land; a taking for which compensation is due will be recognized where a land use regulation goes too far in regulating an owner's use of real property, even if the regulation is enacted pursuant to legislative authority and has a valid police power purpose.

2. CONSTITUTIONAL LAW — MUNICIPAL CORPORATIONS — SIGN CODES — TAKINGS — COMPENSATION.

Enforcement of a municipal sign code that provides that any existing signs on the effective date of the code or any amendment thereto that does not at that time comply with all the code provisions or

amendments thereto shall not be placed, maintained, or displayed after a certain future date may result in a taking for which compensation may be due even though the code gives the sign owner a reasonable period to comply with the ordinance and recover a substantial return on the owner's investment.

3. CONSTITUTIONAL LAW — MUNICIPAL CORPORATIONS — REAL PROPERTY — TAKINGS.

The government may effectively "take" a person's property by overburdening it with regulations; land use regulations effectuate a taking in two general situations: where the regulation does not substantially advance a legitimate state interest or where it denies an owner economically viable use of the land; the latter situation is further subdivided into categorical takings, where the owner is deprived of all economically beneficial or productive use of the land and should automatically recover for the taking, or a taking recognized on the basis of the traditional balancing test whereby a reviewing court must engage in an ad hoc, factual inquiry centering on three factors: the character of the government's action, the economic effect of the regulation on the property, and the extent by which the regulation has interfered with distinct investment-backed expectations; although there is no set formula for determining when a taking has occurred under the balancing test, the question whether the regulation denies the owner economically viable use of the land requires at least a comparison of the value removed with the value that remains.

Fraser Trebilcock Davis & Foster, P.C. (by *Michael H. Perry*), for Adams Outdoor Advertising.

McGinty, Jakubiak, Frankland, Hitch & Henderson, P.C. (by *Thomas M. Hitch*), for the city of East Lansing.

Amicus Curiae:

Bodman, Longley & Dahling LLP (by *James J. Walsh*), for Outdoor Advertising Association of Michigan.

Before: SAWYER, P.J., and KELLY and SMOLENSKI, JJ.

SMOLENSKI, J. Defendant city of East Lansing appeals as of right a final order granting declaratory and injunctive relief in favor of plaintiff Adams Outdoor Advertising. We affirm in part, reverse in part, and remand.

Adams is a company engaged in the business of owning off-premises billboards[1] and leasing the space on these billboards for advertising purposes. In East Lansing, Adams has billboards placed at three different locations. Specifically, at 111 North Harrison and 1108 East Grand River, Adams has three and two, respectively, billboards located on building rooftops pursuant to leases. And, on a narrow strip of property owned by Adams at 1502 West Grand River (the Point), Adams has a total of seven sign faces on five freestanding billboards. All the free-standing billboards at the Point measure twelve feet by twenty-five feet (three hundred square feet) except for one "rotary" or "bulletin" billboard, which measures fourteen feet by forty-eight feet.

In 1975, East Lansing adopted a comprehensive sign code. Under the code, Adams' previously lawful rooftop and freestanding billboards became nonconforming. Specifically, Adams' rooftop billboards were prohibited by the code. The seven sign faces at the Point exceeded the number of signs permitted at this location under the code and violated the code's spacing and setback requirements. In addition, the rotary billboard at the Point exceeded the code's height and three hundred square foot maximum display area

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[1] Off-premises billboards direct attention to a use, business, commodity, service, or activity not conducted, sold, or offered upon the premises where the signs are located. See *Adams Outdoor Advertising v East Lansing*, 439 Mich 209, 213-214; 483 NW2d 38 (1992) (*Adams I*).

requirements. Subsection 8.39(8) of the code, as subsequently amended, gave Adams until May 1, 1987, to eliminate its nonconforming signs:[2]

> 8.39 *Alterations to Signs.* Any existing sign on the effective date of this Chapter or any amendment hereto, which does not at that time comply with all of the provisions hereof, including any amendment:
>
> * * *
>
> (8) Shall not be placed, maintained, or displayed by any person on or after May 1, 1987.

The code did not provide for the payment of any compensation for the removal of Adams' nonconforming billboards.

In early 1987, East Lansing informed Adams that it would be cited for a violation if its nonconforming signs were still in place after the May 1, 1987, deadline. After Adams applied for and was denied a variance by East Lansing's Building Board of Appeals, Adams and others filed suit against East Lansing, seeking declaratory and injunctive relief.

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[2] The "elimination of nonconforming uses and structures over a specified period of time is commonly referred to as 'amortization.' " *Adams I*, n 1, *supra* at 216, n 12. One court observed as follows with respect to the use of the term "amortization" to describe such an ordinance:

> The ordinance here requires that nonconforming signs must be removed or brought into conformance within a specified period of time after they become nonconforming. This is referred to as "amortization," but in reality it is no more than notice to the owner and user of the sign that they have a period of time to make whatever adjustments or other arrangements they can. This is probably not a proper use of the word "amortization," and so used it contains no connotation of compensation or a requirement therefor. [*Art Neon Co v City & Co of Denver*, 488 F2d 118, 121 (CA 10, 1973).]

As relevant to this case, Adams contended that subsection 8.39(8) was enacted without statutory authority and constituted a taking without just compensation. The trial court subsequently found that subsection 8.39(8) was enacted without legislative authority and granted Adams' motion for partial summary disposition. This Court affirmed. *Adams Outdoor Advertising v East Lansing*, unpublished opinion per curiam, decided April 20, 1990 (Docket Nos. 110816-110818).

In *Adams Outdoor Advertising v East Lansing*, 439 Mich 209, 212, 219; 483 NW2d 38 (1992) (*Adams I*), our Supreme Court reversed the decision of this Court on the ground that East Lansing had the authority under subsection 4i(5) of the home rule city act, MCL 117.4i(5); MSA 5.2082(5),[3] to enact its sign code, including subsection 8.39(8). The Court remanded to the trial court to resolve the taking issue.

On remand, the taking issue proceeded to a trial. At the outset of the trial, the court initially ruled that subsection 8.39(8), as applied to Adams' rooftop billboards, constituted a taking because Adams was deprived "of all economically viable use of the property . . . ." The court ruled that it would defer its ruling with respect to Adams' freestanding billboards at the Point until it heard the evidence with respect to the amount of economic loss that Adams would sustain at this location as a result of complying with the sign code.

Although emphasizing that East Lansing had not offered to pay any compensation and that Adams was

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[3] Redesignated as MCL 117.4i(f); MSA 5.2082(f) by 1991 PA 175.

not seeking any compensation but, rather, was seeking a ruling regarding the enforceability of subsection 8.39(8), Adams offered the testimony of an expert in the appraisal of off-premises billboards for the purpose of establishing the amount of economic loss that it would sustain. Adams' expert testified that he had used the income capitalization method to arrive at an estimated value of each of Adams' three sign locations in East Lansing as of November 1996. With respect to the Point, the expert testified that he estimated that the present gross income for the seven sign faces at the Point was approximately $64,500, with a significant portion of this figure (approximately $33,000) attributable to the income produced by the rotary billboard. The expert testified that he understood that under the code Adams would still be permitted to maintain four sign faces at the Point. The expert testified that in going from seven sign faces to four sign faces Adams would lose approximately $44,500 in gross income, which, after applying a 32.6 percent expense ratio (approximately $14,500 in estimated expenses), yielded a loss of $30,000 in net income. The expert testified that $30,000 net income capitalized at a ten percent rate of return yielded an estimated loss at the Point of $300,000. The expert testified that he estimated that the value of the losses that Adams would incur at 111 North Harrison and 1108 East Grand River was $57,500 and $55,000 respectively.

Following the proofs, the court ruled that subsection 8.39(8), as applied to the billboards located at the Point, constituted a taking. Reducing the capitaliza-

tion rate from ten percent to seven percent,[4] the court determined that the loss to Adams at the Point, 111 North Harrison, and 1108 East Grand River was $200,000, $40,250, and $38,500, respectively. The court subsequently entered a final order (1) declaring that subsection 8.39(8), as applied to Adams' billboards, constituted a taking of Adams' property without just compensation in violation of the United States and Michigan Constitutions, and (2) permanently enjoining East Lansing from enforcing subsection 8.39(8) against Adams. East Lansing appeals as of right from this order.

On appeal, East Lansing raises numerous grounds in support of its contention that the trial court erred in determining that subsection 8.39(8), as applied to Adams' billboards, constitutes a taking. Specifically, East Lansing argues that no taking has occurred because the billboards are personal property and the United States Supreme Court has recognized that "in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, [an owner] ought to be aware of the possibility that new regulation might even render his property economically worthless . . . ." *Lucas v South Carolina Coastal Council*, 505 US 1003, 1027-1028; 112 S Ct 2886; 120 L Ed 2d 798 (1992). This argument demonstrates the importance of precisely identifying the property interest claimed to have been taken.

In *In re Acquisition of Billboard Leases & Easements*, 205 Mich App 659, 661; 517 NW2d 872 (1994),

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[4] The court explained that Adams' expert had indicated that the ten percent rate was comprised of seven percent for income stream and three percent for risk factors. In reducing the capitalization rate from ten percent to seven percent, the court stated that no risk existed in this case.

governmental entities had condemned not only billboards but also leaseholds on which the billboards were located. The issue on appeal to this Court was the determination of just compensation for these property interests. *Id.* With respect to the condemned billboards, there was no dispute that just compensation was owed for their full value, and the parties apparently agreed that "this can be determined by estimating the cost of the billboards as 'new less depreciation.'" *Id.* at 661, n 1. With respect to the leaseholds on which the billboards were located, this Court recognized that "[r]egardless of whether a billboard is classified as personal property or a fixture, the leaseholds and air rights that were taken from defendants are real property. This Court has previously held that income capitalization is a proper method of estimating the value of income-producing real property." *Id.* at 662.

In Adams' trial brief in this case, Adams specifically relied on *Acquisition of Leases* for its assertions that the billboards were income-producing real property and that the income capitalization method was the proper method for determining the value of this property. At the outset of the trial, the court ruled as follows:

> The Court finds no merit to Defendant's assertion that there is no right to compensation for leasehold interests such as those possessed by Adams Outdoor Advertising. . . .
>
> As to the proper method of calculating the amount of compensation, the Court finds that the income capitalization method, that is the present value [sic] the future cash flows, is the proper method to be employed.

In light of these rulings and this Court's decision in *Acquisition of Leases, supra*, Adams then successfully moved to have excluded from evidence exhibits pertaining to the cost and depreciation of the billboards, which, we note, would be relevant in establishing the value of the billboards themselves. See *Acquisition of Leases, supra* at 661, n 1.

Thus, despite whatever imprecise characterizations have been used in this case, i.e., that the property taken by subsection 8.39(8) is Adams' "billboards," a review of the record makes it abundantly clear that this case was tried on the theory that the property interests claimed to have been taken by East Lansing's sign code are Adams' real property interests, whether leasehold or fee simple, in the places where its billboards are located. East Lansing's argument that no taking occurred because the billboards are personal property misapprehends the nature of the property interests claimed to have been taken in this case and is therefore rejected.

Next, East Lansing contends that our Supreme Court's decision in *Adams I* makes clear that its power to regulate billboards under the home rule city act is not limited to the same extent that its power to zone is restricted under the zoning enabling act, MCL 125.581 *et seq.*; MSA 5.2931 *et seq.*, with respect to nonconforming uses. We agree. See *Adams I, supra* at 216-217. East Lansing also contends that its sign code, which was enacted for safety and aesthetic reasons, is a valid exercise of its police power and that Adams is not immune from these ordinances. Again, we have no quarrel with this proposition. See *Queenside Hills Realty Co, Inc v Saxl*, 328 US 80, 83; 66 S Ct 850; 90 L Ed 1096 (1946). East Lansing thus con-

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cludes that it can enforce its sign code against Adams even if it means the complete elimination of off-premises advertising and that no claim of a taking can be sustained. We cannot agree with this conclusion. Rather, " '[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.' " *K&K Constr, Inc v Dep't of Natural Resources*, 456 Mich 570, 576; 575 NW2d 531 (1998) (quoting *Pennsylvania Coal Co v Mahon*, 260 US 393, 415; 43 S Ct 158; 67 L Ed 322 [1922]). More specifically, even if a land use regulation substantially advances a legitimate state interest, a taking may be found where "the regulation denies an owner economically viable use of his land." *K&K*, *supra* at 576. Thus, we reject East Lansing's argument that it can enforce its sign code against Adams and no claim of a taking can be maintained. In other words, even though East Lansing has the legislative authority to enact its sign code and even though the code has a valid police power purpose, if the code goes too far in regulating Adams' use of its real property, a taking for which compensation is due will be recognized. *K&K*, *supra*.

Next, East Lansing contends that subsection 8.39(8) does not constitute a taking as applied to Adams' signs because Adams was given a reasonable period to comply with the sign code and recover its investment. In making this argument, East Lansing relies on *Art Neon Co v City & Co of Denver*, 488 F2d 118 (CA 10, 1973), and other cases that have found that ordinances analogous to subsection 8.39(8) do not constitute a taking of property without just compensation. However, in *Adams I*, *supra* at 234-237, Justice LEVIN,

in a separate opinion, rejected the rationale of these cases:

> The courts approving amortization[5] as a reasonable imposition on private property rights have based their conclusions upon policy arguments of dubious merit. Further, the authorities to the contrary, while less numerous, are more persuasive.
>
> Authorities holding that amortization is constitutionally permissible invariably begin by acknowledging the principle that nonconforming uses are not subject to immediate termination.[6] Zoning enactments have traditionally been prospective in effect, partly in the expectation, it has been said, "that existing nonconforming uses would be of little consequence and . . . would eventually disappear." But, as a commentator observed, "the number of nonconforming uses did not decrease, but rather increased due to indifferent or unsympathetic administration of the zoning ordinances, incorrect granting of variances, and influential political pressures."
>
> The impetus for amortization may be communal frustration with how long it has taken nonconforming uses to "eliminate themselves." The Supreme Court of Missouri [in *Hoffmann v Kinealy*, 389 SW2d 745, 750 (Mo, 1965)] explained that some communities have addressed the problem of persistent, nonconforming uses by recourse to legislative legerdemain:
>
> "[Z]oning zealots have been casting about for other methods or techniques to hasten the elimination of nonconforming uses. In so doing, only infrequent use has been made of the power of eminent domain, primarily because of the expense of compensating damaged property owners, but increasing emphasis has been placed upon the amortization or tolerance technique which conveniently bypasses the troublesome element of compensation."

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[5] Amortization is a term commonly applied to ordinances that eliminate nonconforming signs over time. See n 2, *supra*.

[6] For an example of such a case, see East Lansing's cited case of *Art Neon*, *supra* at 121-122.

Courts in states passing favorably on amortization "reason" that, where the private loss to property owners is outweighed by the public benefit of amortizing nonconforming uses, there is no constitutional difficulty if the period of amortization is reasonable.[7] A reasonable amortization period has been said to be one that allows affected property owners adequate time to recover their investment. In this connection, reference is sometimes made to the economic life of the property, such as a "depreciation" period, either in financial accounting or tax accounting terms.[8]

While a community is surely empowered to exercise police power in furtherance of public heath, safety, and general welfare, and "[e]very exercise of the police power is apt to affect adversely the property interest of somebody," the notion that the right or need of the community to exercise its police power may somehow "outweigh" private property interests runs counter to the constitutional limitation requiring payment of just compensation for a taking.

The introduction of a temporal component does not alter the analysis. As the court in [*Hoffmann*, *supra* at 753] said:

"To our knowledge, no one has, as yet, been so brash as to contend that such a pre-existing lawful nonconforming use properly might be terminated *immediately*. In fact, the contrary is implicit in the amortization technique itself which would validate a taking *presently* unconstitutional by the simple expedient of *postponing* such taking for a 'reasonable' time. All of this leads us to suggest, as did the three dissenting justices in *Harbison v City of Buffalo* [4 NY2d 553, 566-567; 176 NYS2d 598; 152 NE2d 42 (1958)], that it would be a strange and novel doctrine indeed which would approve a municipality taking private property for public use without compensation *if the property was not too valuable and the taking was not too soon*, and prompts us to repeat the caveat of Mr. Justice Holmes in [*Pennsylvania Coal*, *supra* at 416], that '[w]e are in danger of for-

---

[7] For an example of such a case, see East Lansing's cited case of *Art Neon*, *supra*.

[8] For an example of such a case, see East Lansing's cited case of *Art Neon*, *supra* at 122.

getting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.'"

The application of "generally accepted accounting principles" in this context is unpersuasive. No reasonable person would seriously suggest that the owner of the Empire State Building could be required, in the exercise of the police power, to remove the building from the land, or even to rebuild it to current specifications, at the conclusion of a thirty- or fifty-year period mandated pursuant to the Internal Revenue Code as representing the useful life of buildings for tax depreciation purposes, without paying just compensation. [Citations omitted.]

Justice LEVIN also noted:

A further factor sometimes taken into account in calculation of a reasonable amortization period is whether the affected property owner, by virtue of the *prospective* ban on the similar use of property by other owners in the community, receives the benefit of a temporary "monopoly" on the nonconforming use. The implicit assumption of this analysis is that the community has a greater right to deprive persons of the use and enjoyment of their property if the community has taken action that indirectly enhances the value of such property.

This argument, like the balance of the analysis applied by the courts finding that amortization does not effect a taking, overlooks the principle that unless a property right is at the outset insubstantial, neither the state nor local governmental units to which the state delegates police power may deprive persons of the use and enjoyment of their property without paying just compensation. The gratuitous, and assertedly fortuitous effects, if any, of "monopoly" do not alter this principle. [*Adams I*, *supra* at 236, n 47.]

Justice LEVIN's separate opinion in *Adams I* did not command a majority of the justices[9] and therefore is not binding on this Court. *Butterworth Hosp v Farm Bureau Ins Co*, 225 Mich App 244, 248; 570 NW2d 304 (1997). Nevertheless, we find Justice LEVIN's opinion persuasive and adopt it as our own. Thus, for the reasons expressed in Justice LEVIN's opinion, we reject East Lansing's contention that subsection 8.39(8), as applied to Adams' billboards, does not constitute a taking because Adams has been given a reasonable period to comply with the ordinance and recover a substantial return on its investment.

Next, East Lansing contends that no claim of a taking can be sustained in this case because enforcement of subsection 8.39(8) against Adams' off-premises billboards does not deny Adams all economically beneficial use of its property.

As indicated previously, the property interests claimed to have been taken in this case are real property interests. Thus, we find the appropriate analysis enunciated in *K&K*, *supra* at 576-577 (citations omitted):

> The United States Supreme Court has recognized that the government may effectively "take" a person's property by overburdening that property with regulations. . . . While all taking cases require a case-specific inquiry, courts have found that land use regulations effectuate a taking in two general situations: (1) where the regulation does not substantially advance a legitimate state interest, or (2) where

---

[9] Specifically, the majority opinion, noting that the trial court had not addressed the taking issue, stated that Justice LEVIN's analysis of the taking issue was "dicta, interesting dicta, but irrelevant to the outcome of this case." *Id.* at 219, n 15.

> the regulation denies an owner economically viable use of his land.
>
> The second type of taking, where the regulation denies an owner of economically viable use of land, is further subdivided into two situations: (a) a "categorical" taking, where the owner is deprived of "all economically beneficial or productive use of land," or (b) a taking recognized on the basis of the application of the traditional "balancing test" established in [*Penn Central, supra*].
>
> In the former situation, the categorical taking, a reviewing court need not apply a case-specific analysis, and the owner should automatically recover for a taking of his property. A person may recover for this type of taking in the case of a physical invasion of his property by the government (not at issue in this case), or where a regulation forces an owner to "sacrifice *all* economically beneficial uses [of his land] in the name of the common good . . . ." In the latter situation, the balancing test, a reviewing court must engage in an "ad hoc, factual inquir[y]," centering on three factors: (1) the character of the government's action, (2) the economic effect of the regulation on the property, and (3) the extent by which the regulation has interfered with distinct investment-backed expectations.

The Court further explained:

> While there is no set formula for determining when a taking has occurred under [the balancing] test, it is at least "clear that the question whether a regulation denies the owner economically viable use of his land requires at least a comparison of the value removed with the value that remains." [*Id.* at 588 (citation omitted).]

With respect to Adams' rooftop billboards, East Lansing's claim that subsection 8.39(8) does not deny Adams all economically beneficial use of its property is dependent on East Lansing's argument that the applicable "unit of property" is not each individual sign, but, rather, is Adams' aggregate signs in either

the "entire Lansing metro market" or the East Lansing area. East Lansing contends that application of subsection 8.39(8) to Adams' rooftop billboards therefore does not constitute a taking because, even after the rooftop billboards are eliminated, Adams will still have signs in either the Lansing or East Lansing markets and thus Adams has not been denied all economically beneficial use of its property.

As explained in *K&K*, *supra* at 578-580 (citations omitted):

> One of the fundamental principles of taking jurisprudence is the "nonsegmentation" principle. This principle holds that when evaluating the effect of a regulation on a parcel of property, the effect of the regulation must be viewed with respect to the parcel as a whole. Courts should not "divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." Rather, we must examine the effect of the regulation on the entire parcel, not just the affected portion of that parcel.
>
> The denominator parcel is also not limited to each parcel of property. As explained by the United States Court of Appeals for the Federal Circuit in *Tabb Lakes, Ltd v United States*, 10 F3d 796, 802 (CA Fed, 1993):
>
> "Clearly, the quantum of land to be considered is not each individual lot containing wetlands or even the combined area of wetlands. If that were true, the Corps' protection of wetlands via a permit system would, ipso facto, constitute a taking in every case where it exercises its statutory authority." [Citations omitted.]
>
> This Court has previously found the nonsegmentation principle applicable to two adjoining parcels of property with unity of ownership. . . .
>
> * * *

> Determining the size of the denominator parcel is inherently a factual inquiry. As explained in *Ciampitti v United States*, 22 Ct Cl 310, 318-319 (1991):
>
> "Factors such as the degree of contiguity, the dates of acquisition, the extent to which the parcel has been treated as a single unit, the extent to which the protected lands enhance the value of remaining lands, and no doubt many others would enter the calculus. The effect of a taking can obviously be disguised if the property at issue is too broadly defined. Conversely, a taking can appear to emerge if the property is viewed too narrowly. The effort should be to identify the parcel as realistically and fairly as possible, given the entire factual and regulatory environment."

In this case, East Lansing raises the "denominator parcel" issue for the first time on appeal. Generally, issues not raised before the trial court are not preserved for appeal. *Schellenberg v Rochester Lodge No 2225*, 228 Mich App 20, 28; 577 NW2d 163 (1998). It is true that this Court may address constitutional questions not raised below where no question of fact exists and the interests of justice and judicial economy so dictate. *Great Lakes Division of Nat'l Steel Corp v Ecorse*, 227 Mich App 379, 426; 576 NW2d 667 (1998). However, determining the denominator parcel is a factual inquiry. *K&K*, *supra* at 580. Thus, we decline to consider this issue.

In any event, contrary to East Lansing's argument on appeal, it is clear from the record that the denominator parcel used by the trial court was not Adams' individual signs. Rather, the denominator parcel used by the trial court was Adams' real property interests in the places where its signs are located, i.e., its fee simple interest at the Point and its separate leasehold interests at 111 North Harrison and 1108 East Grand River, with the income generated by the individual

signs simply used to determine the value of these real property interests. Even if we were to consider the denominator parcel issue, we would find no error because, under the factors enunciated in *K&K*, it is realistic and fair to consider each of Adams' real property interests separately for purposes of the taking analysis in this case. *Id.* at 580.

The trial court found that subsection 8.39(8), as applied to Adams' rooftop leaseholds, constituted a categorical taking. Because the code requires that the rooftop billboards must be removed and no suggestion has been made that Adams might make some other economic or beneficial use of its rooftop leaseholds, we find no error in this regard. We further note that East Lansing raises no argument with respect to the method used to value the rooftop leaseholds. Therefore, we affirm the trial court's final order with respect to Adams' rooftop billboards.

Finally, East Lansing contends that even when the Point is considered the denominator parcel, enforcement of subsection 8.39(8) does not deny Adams all economically beneficial use of the Point because Adams will still be permitted to have four sign faces at this location under the code. East Lansing contends that the trial court thus erred in determining that subsection 8.39(8), as applied to the Point, constitutes a taking.

As indicated previously, Adams was primarily concerned at trial with establishing the amount of its loss at the Point. In determining this amount, the appraiser's testimony assumed that Adams would be permitted to maintain four sign faces at the Point generating approximately $20,000 in gross income, thus indicating that subsection 8.39(8) does not deny

Adams all economically beneficial or productive use of its fee simple at the Point. Therefore, for the purpose of determining whether enforcement of subsection 8.39(8) effected a taking at the Point, the trial court should have applied the ad hoc factual inquiry required by the three-part balancing test, including " 'a comparison of the value removed with the value that remains.' " *K&K*, *supra* at 588 (citation omitted).[10]

However, with respect to the Point, the trial court considered only the second factor (the economic effect of the regulation on the claimant) of the three-part balancing test. Moreover, the court considered this factor only in a limited manner. Specifically, as did Adams, the court focused only on the value of the loss sustained by Adams at the Point. Thus, while the court made a specific finding with respect to the value removed at the Point, the court made no specific finding with respect to the value remaining at the Point. We note that such a value might be calculated on the present record where it was assumed that Adams would be permitted to maintain four sign faces generating a gross income of $20,000. However, Adams disputed this assumption below, arguing that even assuming four sign faces were theoretically or mathematically possible at the Point, there was no showing that the signs would be "usable."

Therefore, as in *K&K*, *supra* at 588, we believe it would be "imprudent to decide whether there was a taking of [Adams'] property [at the Point] on the basis

---

[10] To be fair, although the taking cases relied on by our Supreme Court in *K&K* were decided before the trial in this case, *K&K* itself, with its excellent summary of the law in this area, was not decided until after the trial in this case.

of an inadequate record." Therefore, we reverse the trial court's final order with respect to the Point and remand to the trial court for further consideration. The court must calculate the value remaining at the Point and then reevaluate Adams' claim of a taking at the Point under the three-part balancing test. The trial court may, but need not, take additional proofs to supplement the existing record as it, in its learned discretion, deems necessary to properly consider the three-part balancing test.

In summary, we affirm the trial court's final order with respect to Adams' rooftop billboards. We reverse the trial court's final order with respect to Adams' freestanding billboards at the Point and remand for further proceedings in accordance with this opinion.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

D

Trial Court Opinion

Lansing, Michigan
December 9, 1996.

(Court, Counsel, and all interested parties present at 8:42 a.m.)

THE COURT: Let the record show this is the matter of Adams Outdoor Advertising versus the City of East Lansing. There are no other Plaintiffs, right?

MR. PERRY: True.

THE COURT: Docket 59541-CZ.

Before we begin, the Court's received briefs from the parties, trial briefs, and their responding to.

It appears to the Court the only issue remaining is whether the City of East Lansing's sign ordinance as to the Plaintiff's off-premises signs constitutes a taking, and if so, to what extent. I appreciate counsel supplying briefs on this issue so we can resolve some of these issues before we take proofs.

Although the taking issue is not addressed in the majority opinion of the Supreme Court's 1992 decision in this case, Justice Levin, in a separate opinion, discussed the takings issue at great length. In his opinion, Justice Levin made a distinction between on-premises and off-premises signs by suggesting that the [sic] only the diminution of the value of the latter could constitute a constitutional taking that requires just compensation be given to the Plaintiff. And in so holding, Justice Levin know [sic] that off-premises signs generally constitute the primary, and often the entire use of the property in which they are located, whereas on-premises signs are incidental to the conduct of a business. Ultimately, Justice Levin found it appropriate

Trial Court Opinion

to leave to this Court to determine the facts and the law with regard to the claim of a partial taking.

The Supreme Court's decision in the instant case preceded the United States Supreme Court's decision in Lucus v. South Carolina Coastal Council, 505 U.S. 1003; 112 S.Ct. 2886; 120, L.Ed. 2d 798, a 1992 matter. However, the principles enunciated by Justice Levin are consistent with those principles under the opinion of the Lucas decision. In Lucas the Supreme Court ruled that where an owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave this property economically idle, he has suffered a taking. Similar to the property regulations in Lucas, the City of East Lansing's sign ordinance has the potential of depriving Adams Outdoor Advertising of all economic value of its off-premises signs.

The off-premises signs that are the cneter of this controversy follow into one of two groups. The first group of signs consists of off-premises rooftop signs, which, under the City ordinance, have been deemed illegal.

The second group of signs consist of billboard signs which ostensibly exceed the allowable size, height, setback, and number per parcel requirement of the ordinance.

As to the rooftop signs, the Court finds that their required removal amounts to a deprivation of all economically viable use of the property, and therefore, constitutes the taking for which Adams Outdoor is entitled to just compensation.

As to the billboard signs, the Court is inclined to defer its ruling until Court has had an opportunity to hear the evidence in order to determine the exact amount of

Trial Court Opinion

economic loss that will result from the modification or removal of the billboards so as to bring them into conformity with the size, height, setback, and number per parcel requirements of the East Lansing ordinance.

The Court finds no merit to Defendant's assertion that there is no right to compensation for leasehold interests such as those possessed by Adams Outdoor Advertising. Nor does the Court find any merit for the City's contention that because the ordinance amounts to a valid exercise of police powers, the Plaintiff is not entitled to just compensation for any constitutional taking.

As to the proper method for calculating the amount of compensation, the Court finds that the income capitalization method, that is, the present value the future cash flows, is the proper method to be employed.

Moreover, the fact that Adams Outdoor Advertising may have benefitted [sic] from a legal monopoly can be taken into consideration when calculating the appropriate compensation.

Okay. Let's let loose the dogs of war. Mr. Perry? You have a question, Mr. Hitch?

MR. HITCH: I do, Your Honor. The Court has apparently made the ruling as it relates to rooftop signs. I would ask that I be given the opportunity during this hearing, also, to show evidence as it relates to the rooftop signs, so as to show that this doesn't constitute a taking, recognizing that the Court's ruling has been made.

E

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

ADAMS OUTDOOR ADVERTISING, a corporation,

Plaintiff,

v

CITY OF EAST LANSING, a Michigan municipal corporation,

_____/

Case No.: 87-59541-CZ

Hon. Thomas L. Brown

FINAL JUDGMENT AND ORDER OF DECLARATORY AND INJUNCTIVE RELIEF

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_____

ORDER

At a session of said Court held on
the 8th day of January, 1997.

The Plaintiff having claimed that Section 8.39(8) of Chapter 99 of the Defendant's Code of Ordinances is unconstitutional because it provided that the Plaintiff could not place, maintain or display its previously lawful non-conforming off-premises signs after May 1, 1987 and did not provide for the payment of just compensation for the removal of those signs, and the Court having conducted a non-jury trial on December 9, 1996, and each party having submitted evidence in support of its respective position, and each party having submitted a Trial Brief, and the Court having made certain findings at the conclusion of the trial which are expressly adopted and incorporated herein, and in particular, the Court having determined that the value of the Plaintiff's off-premises advertising signs is $288,750, and the Court being otherwise advised in the premises;

IT IS HEREBY ORDERED, DECREED AND ADJUDGED THAT:

1. Section 8.39(8) of Chapter 99 of the Defendant's Code of Ordinances, as applied to the Plaintiff's off-premises advertising signs, is an unconstitutional taking of the Plaintiff's property without the payment of just compensation contrary to Mich. Const. 1963, Article 10, Section 2 and U.S. Const. V and XIV;

2. The Defendant is permanently enjoined from enforcing Section 8.39(8) of Chapter 99 of its Code of Ordinances against the Plaintiff. Adams Outdoor Advertising Company shall be allowed to continue

to place, maintain and display its off-premises signs.

3. The Plaintiff is awarded its taxable costs in accordance with M.C.R. 2.625(a)(1);

4. This is a final Judgment and Order which concludes all of the claims and which has declared and determined all of the parties' respective rights and liabilities in connection with those claims.

/S/
Thomas L. Brown, Circuit Court Judge

Approved for entry:

/S/
Michael H. Perry (P22890)
Attorneys for Plaintiff

Dated: 1/6/97

/S/
Thomas M. Hitch (P25558)
Attorneys for Defendant

Dated: 12/30/96

F

8.38[1] Prohibited Signs. Unless otherwise permitted by any other provision of this Chapter, no sign shall be constructed, erected, or maintained:

(1) Which purports to be, or is an imitation of, or resembles an official traffic sign or signal, or which bears the words "Stop," "Go Slow," "Caution," "Danger," "Warning," or similar words used in traffic control

(2) Which, by reason of its size, location, context, coloring or manner of illumination may be confused with or construed as a traffic control sign; or which either hides from view any approved traffic or street sign or signal, confuses or misleads traffic, obstructs vision necessary for traffic safety, or distracts from visibility of traffic signs

(3) Which consists of banners, except where permitted by Section 8.33(1)(k), posters, pennants, ribbons, streamers, strings of light bulbs, spinners, or elements creating

[1]§8.38 amended, Ord. 572, 06-05-84; Ord. 823, 03-01-94; Ord. 910, 08-19-97.

sound, except seasonal decorations and community event signs

(4) Which has any visible moving part, visible revolving parts, or visible mechanical movement of any description or other apparent visible movement achieved by electrical, electronic, or mechanical means, including intermittent electrical pulsations, or by action of normal wind currents, other than for the conveyance of noncommercial information which requires periodic change

(5) Signs, other than those described in 8.36(16), which incorporate in any manner any flashing or moving lights

(6) Which is structurally unsafe, or constitutes a hazard to safety or health by reason of inadequate maintenance, dilapidation, or abandonment, or is not kept in good repair, or is capable of causing electrical shocks to persons likely to come in contact with it or vehicles colliding with it

(7) Which obstructs the ingress to or egress from a required door, window, fire escape, or other required exit way

(8) Which is unlawfully installed, erected, or maintained

(9) Which consists or is part of an outdoor merchandise display not screened from public streets or adjacent resident property

(10) Which is a Projecting Sign, except where permitted by Section 8.33(1)

(11) Which projects over twelve (12) inches into the public right-of-way, except marquee signs which have been constructed pursuant to a valid building permit authorized by the City Council, and except development entry signs approved by the City Council. No person, corporation, or unincorporated association shall erect or maintain a development entry sign within the public right-of-way without first having obtained a permit and filing a certificate of insurance as required by §4.3 of Chapter 43 of this Code

(12) Which is a Roof Sign

(13) Which is a Portable Sign, or an "A" frame sign, except where permitted by Section 8.33(1)

(14) Which exceeds seventy-two (72) square feet in surface display area

(15) Which is not expressly permitted by this Chapter or which violates any provision thereof

(16) Which is mounted on a vehicle parked on private property or within a public right-of-way, when such vehicle is parked for the purpose of display

(17) Which is not expressly permitted by this Chapter to be placed in the public right-of-way.

ARTICLE VI: EXISTING SIGNS

8.39[2] Alterations to Signs. Any existing sign on the effective date of this Chapter or any amendment hereto, which does not at that time comply with all of the provisions hereof, including any amendment:

(1) Shall not be changed to another type of sign which is not in compliance with this Chapter

(2) Shall not have any changes made in the words or symbols used or the message displayed on the sign unless the sign is designed for periodic change of message

(3) Shall not be structurally altered so as to prolong the life of the sign or so to change the shape, size, type, or design of the sign

(4) Shall not have its face or faces changed unless the sign is brought into conformance with the requirements of this Chapter, or unless the sign is an off-premises sign or billboard constructed to permit a change of face

[2]§8.39 amended, Ord. 572, 06-05-84.

(5) Shall not be reestablished after the activity, business or usage to which it relates has been discontinued for a period of ninety (90) days or longer

(6) Shall not be reestablished after damage or destruction if the estimated expense of reconstruction exceed fifty percent (50%) of the appraised replacement cost as determined by the Building Official

(7) Shall not ever be placed, maintained, or displayed by anyone other than the person who owned the premises on the date of adoption of this Chapter

(8) Shall not be placed, maintained, or displayed by any person on or after May 1, 1987

Supreme Court, U.S.
FILED
FEB 8 2001
OFFICE OF THE CLERK

(3)

No. 00-1108

IN THE
Supreme Court of the United States

ADAMS OUTDOOR ADVERTISING,

Petitioner,

v.

CITY OF EAST LANSING,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF MICHIGAN

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

A. History of Sign Regulation

This case involves the challenge by Adams Outdoor Advertising, Inc. ("Adams") to the constitutionality of the East Lansing Sign Code as it applies to two sets of rooftop billboards located in East Lansing, Michigan. In order to consider this issue, a brief history of sign regulation in East Lansing is in order. Prior to the adoption of the current Sign Ordinance there were no formal regulations regarding height, size, and placement of signs and billboards in East Lansing, except through regulations regarding structural integrity so that they would not fall down or blow over.

In the late 1960s and early 1970s, the City undertook a study of comprehensive sign regulations. In 1973, East Lansing commissioned a report entitled "Traffic Safety Considerations in Roadside Displays". This report recommended detailed, uniform standards with respect to height, size, placement, sign clearance and setback of signs so as to avoid confusing or misleading traffic, to eliminate vision obstructions necessary for traffic safety, and to otherwise improve the public safety along the City's major streets. The report was incorporated into a comprehensive report and a set of ordinance recommendations were made by a subcommittee of the Planning Commission and Planning staff to the City Council in the fall of 1973.

On October 7, 1975, the Sign Ordinance (Ordinance No. 382) went into effect, the result of which was to regulate signs and billboards throughout the city. Hundreds of signs within the city did not meet the height, size, placement and location requirements of the Sign Ordinance. Ordinance

No. 382 originally contained an amortization provision at Section 8.39(8) which provided that all such signs or billboards would have to conform or be removed within eight (8) years from the effective date of the ordinance. This deadline was extended twice. Pursuant to the terms of the ordinance and subsequent amendments, those signs or billboards which did not meet the requirements of the ordinance as of October 7, 1975, including Adams' rooftop billboards, have had a period of approximately 12 years within which to comply.

B. Adams' Rooftop Billboards in East Lansing

Adams owns rooftop billboards on property it leases from two East Lansing property owners. The rooftop billboards located at 1108 E. Grand River are on the premises owned by JLN of Mid-Michigan, LLC; the location is above a building used as a party store. The rooftop billboards at 111 N. Harrison are on property owned by David H. Krause; the location is above a convenience store and a store supplying silk screening, logos and art supplies. The East Grand River billboards were built in 1968 at an estimated cost of $1,714; the North Harrison billboards were constructed in 1955 at an estimated cost of $1,200. The current lease for East Grand River was executed on July 15, 1996, for a term of ten years, with annual installments of $3,200 for the first five years and increasing to $4,000 for the remaining five years. The current North Harrison lease was executed in 1998 and extends for five years, with lease payments of $6,000 per year.

Under the East Lansing ordinance, roof signs and billboards are prohibited. They were permitted to be maintained lawfully from the effective date of the ordinance,

October 7, 1975, until May 1, 1987, pursuant to the provision at Section 8.39 which related to existing signs. Section 8.39 provides in pertinent part as follows:

> Section 8.39 *Alterations to Signs*. Any existing sign on the effective date of this Chapter or any amendment hereto, which does not at that time comply with all of the provisions here, including any amendment:
>
> * * *
>
> (8) Shall not be placed, maintained, or displayed by any person on or after May 1, 1987
>
> (Pet. App., pp. 59-60)

While not the subject of this litigation, Adams has other freestanding billboards in East Lansing on property that it owns.

C. History of Litigation

On August 21, 1987, Adams filed suit against the City seeking to declare as unconstitutional the City's Sign Code as applied to the rooftop billboards, among other billboards, which are the subject of this litigation.

The suit has been ongoing since 1987. As it pertains to the billboards owned by Adams (including the rooftop billboards), the parties have twice been before the Michigan Court of Appeals, which had twice affirmed the Ingham County Circuit Court rulings (Hon. Thomas L. Brown presiding) that the East Lansing Sign Code was

unconstitutional, and twice before the Michigan Supreme Court, which reversed the decisions of the Court of Appeals and the Ingham County Circuit Court. In the Supreme Court's first decision, *Adams Outdoor Advertising v. City of East Lansing*, 439 Mich. 209, 483 N.W.2d 38 (1992), the Court held that the City had authority under the Michigan Home Rule Act to regulate signs including eliminating nonconforming signs through the use of an amortization provision; as noted before, the sign ordinance went into effect in October, 1975, and allowed Adams to maintain its rooftop billboards through May 1, 1987. In its second decision, *Adams Outdoor Advertising v. City of East Lansing (Adams II)*, 463 Mich. 17, 614 N.W.2d 634 (2000), the Michigan Supreme Court held that the City was not obligated to pay compensation to Adams when it required the removal of the rooftop billboards, as there was no taking. The Court found that the leases included, at most, the right to display roof top billboards subject to "reasonable police power regulations." (Pet. App., p. 9.) The Court found that under the categorical taking's analysis or the balancing test, there was no taking. (Pet. App., p. 10.)

Adams has now filed its petition for a Writ of Certiorari. It should be noted that Adams, along with the lessors, has also filed suit in the U.S. District Court for the Western District of Michigan, seeking to overturn the decision of the Michigan Supreme Court. *See Adams Outdoor Advertising v. City of East Lansing*, No. 5:00-CV-119.

REASONS FOR DENYING THE WRIT

I.

THE DECISION OF THE MICHIGAN SUPREME COURT DOES NOT CONFLICT WITH THIS COURT'S RULINGS IN *UNITED STATES v. GENERAL MOTORS*, 323 U.S. 373, 65 S. Ct. 357; 89 L. Ed. 311 (1945) AND *UNITED STATES v. PETTY MOTOR CO.*, 327 U.S. 372, 66 S. Ct. 596, 90 L. Ed. 729 (1946) WHERE THE ROOFTOP LEASES THAT WERE IN EFFECT AT THE TIME THE ORDINANCE WAS ADOPTED HAVE LONG EXPIRED.

In the case at bar, Adams has leased billboard space at the two locations in East Lansing from the owners of the real property. As noted, the current lease for the East Grand River Avenue was executed on July 15, 1996, for a ten-year period, while the current lease at 111 N. Harrison commenced on April 1, 1998, for a period of five years. These leases, however, were not in effect when the East Lansing sign ordinance went into effect. By their terms, those leases expired long ago. Leases for billboard space typically would extend for five years only. Thus, the leases that were in effect during the amortization period between when the ordinance first went into effect (October 1, 1975) and when the billboards were to be removed (May 1, 1987) have long expired.

As this is the factual circumstance in this case, the cases cited by the Petitioner, *United States v. General Motors*, 323 U.S. 373, 65 S. Ct. 357, 89 L. Ed. 311 (1945) and *United States v. Petty Motor Co.*, 327 U.S. 372, 66 S. Ct. 596, 90 L. Ed. 729 (1946) are completely inapplicable to the case

at bar. In both of those cases, the United States, pursuant to the Second War Powers Act, 50 U.S.C.A. Appendix, § 632, condemned the leasehold interests of the occupants in order for the government to take control of and use the property for the war effort. In each case, at the time of condemnation, there was a certain number of years left on the leases then in force. The United States Government occupied the premises for the balance of the term of the leases and the question before this Court was how to value those interests in the hands of the lessees. *See General Motors Corp.* at 380 and *Petty Motors* at 376. The government action in those cases effected a seizure of the tenants' interest in the leases in force at the time of the seizure.

In the case at bar, the leases in effect in 1975 when the ordinance went into effect, have long expired. At that time, the ordinance did not prevent Adams from leasing its billboard and honoring the balance of its lease. As the leases were typically five-year renewals, the leases were renewed, without running afoul of the ordinance, and Adams' predecessor, Central Advertising Company, has received the benefits of the leases. Under that circumstance, there was no taking as Central Advertising presumptively received all the monies owed under the terms of its leases without interference from the City.

At some point, however, upon the renewal of the leases, Adams undertook to enter into leases which extended beyond the time in which it was lawful, under the City's ordinance, to maintain the rooftop billboards. The question is, whether Adams is entitled to compensation when it entered into a leases that violated the ordinance by providing for the display and use of the rooftop billboards after it was unlawful to maintain them. Adams has cited no case that supports its

position. Plainly, *General Motors* and *Petty Motor* do not stand for that proposition. The essence of Adams' argument is that once it has leased space for its billboards, regardless of the term of those leases, its continued right to use that space is immutable and subject to no further government regulation, without payment of compensation. For the reasons set forth hereinafter, that position is completely untenable.

The Michigan Supreme Court decision in this case does not conflict with *General Motors* or *Petty Motor*, and has not decided an important federal question in a way that conflicts with those decisions. The arguments of Adams are without merit and this Court should deny the petition.

II.

ADAMS HAS NO VESTED RIGHT IN THE REGULATION-FREE CONTINUANCE OF THE USE OF ITS ROOFTOP BILLBOARDS.

Adams does not have the vested right to maintain its existing billboards, and does not have the unfettered right to conduct its business immune from reasonable regulation. *See Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 508-509, 101 S. Ct. 2882, 692 L. Ed. 2d 2800 (1981). Indeed, the City of East Lansing, under Michigan's Home Rule Cities Act, was granted the specific enumerated authority to regulate signs and billboards within its jurisdiction. *See* MCLA 117.4i(5); MSA 5.2082(5).

It is clear that municipalities, for traffic and aesthetic reasons, may regulate billboards, even if it means the

complete elimination of off-premises advertising. In one of its several opinions, this Court wrote in *Metromedia*, at 509-511:

> [T]he California Supreme Court agreed with many other courts that a legislative judgment that billboards are traffic hazards is not manifestly unreasonable and should not be set aside. We likewise hesitate to disagree with the accumulated, common-sense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety. There is nothing here to suggest that these judgments are unreasonable.
>
> * * *
>
> We reach a similar result with respect to the second asserted justification for the ordinance — advancement of the city's aesthetic interests. It is not speculative to recognize that billboards by their very nature, wherever located and however constructed, can be perceived as an "aesthetic harm." San Diego, like many States and other municipalities, has chosen to minimize the presence of such structures.

The City plainly can enforce its regulations against the "existing" billboards of Adams. Adams is not immune from the ordinances of the City and could be compelled to meet the requirements of those regulations without the City being required to make restitution or to pay compensation.

In its opinion, the Michigan Supreme Court did not break new legal ground when it wrote:

> Accordingly, even before enactment of the sign code, the leases at issue did not include an absolute right to display signs on the rooftops. At most, the leases included a right to display signs on the rooftops subject to reasonable police power regulations that did not effect a taking of the lessors' interests.

(Pet. App., p. 9.)

This is plainly consistent with existing federal constitutional law. It has long been recognized that regulations promulgated pursuant to police powers may have a significant impact on businesses and the use of property, and no claim of a taking can be sustained. Whether affecting real property or not, regulations have historically applied to structures built prior to the enactment of such regulations without running afoul of the Takings Clause. The leading case is *Queenside Hills Realty Co. v. Saxl*, 328 U.S. 80, 66 S. Ct. 850, 90 L. Ed. 1096 (1946). In that case, a question arose whether certain New York building regulations (requiring sprinkling systems in certain lodging houses) could be imposed on structures which were built prior to the enactment of those building regulations. The defendant argued that it would be a denial of due process for those regulations to be imposed on properties which, at the time of their construction, met with the then existing regulations. The defendant argued that it would constitute a taking without just compensation and as such was not enforceable.

This Court rejected that argument. Justice Douglas, writing on behalf of the Court, held:

> But the legislature may choose not to take the chance that human life will be lost in lodging house fires and adopt the most conservative course which science and engineering offer. It is for the legislature to decide what regulations are needed to reduce fire hazards to the minimum. Many types of social legislation diminish the value of the property which is regulated. The extreme cases are those where in the interest of the public safety or welfare the owner is prohibited from using his property. *Reinman v. Little Rock*, 237 U.S. 171, 35 S.Ct. 511, 59 L.Ed. 900; *Hadacheck v. Sebastian*, 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348, Ann.Cas. 1917B, 927; *Pierce Oil Corp. v. Hope*, 248 U.S. 498, 39 S.Ct. 172, 63 L.Ed. 381. We are dealing here with a less drastic measure. ***But in no case does the owner of property acquire immunity against exercise of the police power because he constructed it in full compliance with the existing laws. Hadacheck v. Sebastian***, supra, 239 U.S.at page 410, 36 S.Ct. at page 145, 60 L.Ed. 348, Ann.Cas. 1917B, 927. And see *Chicago, B. & Q.R. Co. v. Nebraska*, 170 U.S. 57,18 S.Ct. 513, 42 L.Ed. 948; *Hutchinson v. Valdosta*, 227 U.S. 303, 33 S.Ct. 290, 57 L.Ed. 520. The police power is one of the least limitable of governmental powers, and in its operation often cuts down property rights. *Block v. Hirsh*, 256 U.S. 135, 155, 41 S.Ct. 458, 459, 65 L.Ed. 865, 16 A.L.R. 165. And see *Plymouth Coal Co. v. Pennsylvania*, 232 U.S. 531, 34 S.Ct. 359, 58 L.Ed. 713. *Id* at 83 [emphasis supplied]

In *Queenside Hills*, the property owner maintained essentially the same argument as Adams in the instant case. That is, that Adams' structures (the billboards) met the regulations of the day when constructed and therefore the new regulations cannot now be imposed. As in *Queenside Hills*, this argument should be rejected and the conclusion reached that no "taking" has occurred. *See also Sign Supplies of Texas v. McConn*, 517 F. Supp. 788 (S.D. Tex. 1980) [the making illegal of portable signs].

Adams could have no reasonable expectation that the billboards used in its advertising business would remain "regulation free" in the future. As Adams had no vested right to a regulation-free environment, the City, under its police powers, *always* retained the power to regulate existing billboards, even if their removal was required.

The City's ordinance requiring removal of the rooftop billboards is constitutional and the recognition of the Michigan Supreme Court that the City of East Lansing could regulate billboards is not in conflict with any decision of this Court. The Petition for a Writ of Certiorari should be denied.

III.

THE MICHIGAN SUPREME COURT'S RULING THAT THE CITY HAD NOT UNCONSTITUTIONALLY TAKEN THE PETITIONER'S INTEREST IN ITS ROOFTOP BILLBOARDS DOES NOT CONFLICT WITH THIS COURT'S RULING IN *LUCAS v. SOUTH CAROLINA COASTAL COUNCIL*, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992).

In the case at bar, the City of East Lansing has employed a time-honored method in regulating signage within a community. It has established a time period between the effective date of the regulations and a date when all signs, irrespective of the date they were erected, must comply. This period of time is called an "amortization period" and provides the sign owner with a certain additional useful life of the sign before it must be brought into conformance with the then current sign regulations.

There are many cases from jurisdictions all over the country which hold that no compensation is required when eliminating billboards or making them conform to current regulations if a reasonable period for compliance and cost recovery is provided. One of the leading cases is *Art Neon Co v. City and County of Denver*, 488 F.2d 118 (10th Cir. 1973). In concluding that by providing an amortization period that is reasonable in length, there would be no taking if existing signs were removed, the United States Court of Appeals held:

> It is obvious that in the balancing process some loss or burden will fall on a sign owner or user.

It is not required that the nonconforming property concerned have no value at the termination date. The plan need not be so constructed. The many and varied valid exercises of police power in other areas so demonstrate the impact on the individual. See *Goldblatt v. Hempstead*, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130; *United States v Central Eureka Mining Co.*, 357 U.S. 155, 78 S.Ct. 1097, 2 L.Ed.2d 1288; *Hadacheck v Sebastian*, 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348; *Mugler v Kansas*, 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205. The legislative determination must only meet the test of "reasonableness," that is, the plan for termination must be "reasonable." *Standard Oil Co. v Marysville*, 279 U.S. 582, 49 S.Ct. 430, 73 L.Ed. 856; *National Advertising Co. v Monterey*, 1 Cal.3d 875, 83 Cal.Rptr. 577, 464 P.2d 33 (Cal.) This is not a test of concept of "just compensation." The Court in *United States v Central Eureka Mining Co.*, 357 U.S. 155, 78 S.Ct. 1097, 2 L.Ed.2d 1288, said: "[T]he mere fact that the regulation deprives the property owner of the most profitable use of his property is not necessarily enough to establish the owner's right to compensation." And further in *Miller v Schoene*, 276 U.S. 272, 48 S.Ct. 246, 72 L.Ed. 568: "[W]here the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property." *Id* at 121-122.

Art Neon followed a long line of cases holding that amortizing signs, whether on-premises or off-premises, over a reasonable period is not a constitutionally infirm taking. In *Grant v. Mayor and City Council of Baltimore*, 212 Md. 301, 129 A.2d 363, 367 (1957), wherein the Court held that the amortization provisions of a local ordinance requiring the removal of billboards from residential zoning districts was not unconstitutional, the Maryland Court of Appeals, citing *City of Los Angeles v. Gage*, 127 Cal. App. 2d 442, 274 P.2d 34 (1954), stated:

> The elimination of existing uses within a reasonable time does not amount to a taking of property nor does it necessarily restrict the use of property so that it cannot be used for any reasonable purpose. Use of a reasonable amortization scheme provides an equitable means of reconciliation of the conflicting interests in satisfaction of due process requirements.

Since that time, there have been numerous decisions upholding the amortization of signs and billboards, and finding that there was no taking. *See Georgia Outdoor Advertising v. City of Waynesville*, 900 F.2d 783 (4th Cir. 1990); *Naegele Outdoor Advertising v. City of Durham*, 844 F.2d 172 (4th Cir. 1988), *after remand*, 803 F. Supp 1068 (M.D. N.C., 1992), *aff'd*, 19 F.3d 11 (4th Cir. 1994), *cert. denied*, 513 U.S. 928, 115 S. Ct. 317, 130 L. Ed. 2d 278 (1994); *Fayetteville v. McIlroy Bank & Trust Co*, 278 Ark. 500, 647 S.W.2d 439 (1983); *Suffolk Outdoor Advertising Co. v. Southampton*, 60 N.Y.2d 70, 455 N.E.2d 1245 (1983). *See generally, Validity of Provisions for Amortizing Nonconforming Uses*, 8 A.L.R. 5th 391 (1992).

It is significant that many of these decisions have been decided *after* the U.S. Supreme Court's decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992). *See, for example, Barton Wilson v. City of Louisville*, 947 F. Supp. 948 (W.D. Ky. 1994).

The most thorough analysis of the amortization issue after the *Lucas* decision occurs in the District Court decision of *Naegele, supra*. In that case, the district court (on remand) went through an extensive analysis to determine whether the Durham, North Carolina, ordinance which required the removal of 103 of 270 billboards after a 5½-year amortization period violated the United States Constitution. In addition to looking at the term of the amortization period, the trial court examined a number of factors to determine whether the ordinance could be upheld. It concluded that the ordinance was constitutional.

The first issue considered by the court was what was Naegele's "unit of property" that could be taken (*Id.* at 1073). The court held that it was not the individual signs but, rather, the whole of Naegele's signs in the Durham area. *Id.* at 1074. *See also Naegele* at 844 F.2d at 176.

During the trial in this matter, certain data regarding Adams' billboard business was introduced into evidence. Adams advertises in the entire Lansing, Michigan, metropolitan market. Using the year ending December 31, 1995, gross revenues were $8,994,754, on revenues from the hundreds of billboards in the Lansing area. The net profit was $3,177,773. The total profit of the rooftop billboards in East Lansing in 1995 (that is, one-half of the gross revenues of $11,404 from the N. Harrison billboards and $10,395 from

the E. Grand River billboards) was $10,899.50. That profit represents .34% of the profit earned by Adams in the metropolitan Lansing area. The City's ordinance would have a negligible effect on Adams' operation in the Lansing area, and it pales in comparison to impact of the Durham ordinance where the impacted billboards represented 29.7% of the total revenues of Naegele. Like the coal pillars referenced in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 107 S. Ct. 1232, 94 L. Ed. 2d 472 (1987), the individual signs should not be viewed as separate "units" of property.

Furthermore, even if this Court considered all of East Lansing as a separate unit, the same result would occur. Adams has built an additional billboard with two sign faces since the inception of this lawsuit. Even if Adams were required to eliminate the rooftop signs, Adams would have a minimum of three billboards with six faces within the City of East Lansing. Such a reduction does not constitute the deprivation of "all economically beneficial use" of Adams' property in East Lansing and, as significant rights remain, there can be no claim of taking. *See Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 130-131, 98 S. Ct. 2646, 2662, 57 L. Ed. 2d 631 (1978); *Naegele* at 1072.

The trial court in *Naegele* also looked at the reasonableness of the amortization period and found that for an amortization period to be reasonable, it must give the property owner a reasonable opportunity to recoup or minimize the loss of the use of this property by the end of the amortization period. *Id.* at 1077. In *Naegele*, the court found that the amortization period did not allow *Naegele* to recover the present value of the income stream over the remaining useful life of the signs, but nonetheless found the ordinance constitutional.

The Court stated:

> Whether or not the revenue recovered during the amortization period might be "just compensation" if a "taking" had occurred, the benefit conferred by the grant of an amortization period may be taken into account in considering the economic impact of the regulation. *See Penn Central*, 438 U.S. at 137, 98 S.Ct. at 2666 (landowner's transferrable development rights conferred by government program mitigate financial burden imposed even if not "just compensation"). By virtue of the amortization period granted in the ordinance, Naegele has earned more than $1.7 million in revenue and has had 5½ additional years of use of the disputed signs. Based on its earnings during the amortization period, Naegele will lose this revenue, which includes an estimated $256,583.44 in sharing revenue, during a comparable time period after the ordinance is enforced. Nonetheless, Naegele has not contended that its outdoor advertising business in the Durham metro market will no longer be viable after the ordinance requires removal of the affected signs. Naegele has recovered nearly twice the fair market value of the disputed signs during the amortization period, and there is no evidence that Naegele will not be able to realize a reasonable return on its remaining signs.

Id. at 1078-1079.

Even given that the cost was not fully recovered, the ordinance in *Naegele* was still deemed to be constitutional.

The effect on Adams, in the metropolitan Lansing area, for the loss of these rooftop signs is negligible. During the amortization period, Adams has maintained its rooftop billboards. The ruling of the Michigan Supreme Court does not conflict with *Lucas* because there is no taking of all of the economic value of Adams' property. There is no merit to Adams' argument and the petition to issue the writ should be denied.

IV.

THE MICHIGAN SUPREME COURT DID NOT COMMIT REVERSIBLE ERROR WHEN IT FOUND THAT ADAMS HAD NO REASONABLE EXPECTATION THAT IT COULD MAINTAIN THE BILLBOARDS AFTER THE DATE DESIGNATED IN THE CITY CODE.

Adams raises as its final issue the claim that it was error on the part of the Michigan Supreme Court to conclude that Adams had no reasonable investment-backed expectation that it could maintain the signs at the rooftop locations after they were proscribed by the City's ordinance., citing as authority this Court's granting of certiorari in *Palazzolo v. Rhode Island,* Supreme Court Docket No. 992047, *cert granted*, 69 U.S. Law Week 3257 (October 10, 2000). Adams argues that as this Court has granted leave in that case to consider, among other issues, whether a land owner can assert a regulatory takings claim when the regulations that affected the taking went into effect prior to the land owner's ownership, that the Michigan Supreme Court must have erred. A review of the issue, however, will disclose that it is not meritorious and does not form a basis upon which this Court should grant the petition for writ of certiorari.

It should first be noted that even assuming Adams' argument is correct, Adams cannot prevail. As noted before, Adams does not prevail because it cannot prevail under the "unit of property" analysis which is central to the takings analysis crafted by this Court. *See Keystone Bituminous* and *Penn Central*. A fair reading of the Michigan Supreme Court's decision finds that whether Adams had a "reasonable investment-backed expectation" was but one of the issues in which Adams' arguments failed. This issue, even if Adams is correct, affords no basis of relief.

Secondly, the Rhode Island Supreme Court, in *Palazzolo* was confronted with an entirely different factual circumstance than the Michigan Supreme Court. The interest at stake for the land owner in *Palazzolo* was markedly different than Adams' interest in the leased air space above the buildings where its billboards are located. Regardless of how this Court treats the unit of property issue, it appears indisputable that Palazzolo cannot use the 18 acres at all. The City's prohibition on the use of the air space for billboards and signs notwithstanding, the land owner retains significant uses and value to his property after the effective date of this ordinance. For example, the airspace restrictions for display of signs does not prevent the landowner from adding additional floors to the building. The effects on the landowner are minimal and the effects of the removal of these two signs on Adams' billboards in the metropolitan Lansing area are negligible. The factual circumstances are completely different and, irrespective of what this Court does in the *Palazzlo* case, provides Adams with no support in its claim.

Finally, in taking the argument full circle, Adams never had the expectation, nor did its lessors, that the air space where its billboards were located would always be regulation

free. There are, for example, thousands of examples of zoning ordinances throughout the United States which restrict the heights of buildings depending upon the zones where the property is located. *See Welch v. Swase*, 214 U.S. 91, 29 S. Ct. 567, 53 L. Ed. 923 (1907). Air space above buildings is clearly subject to regulation. Given that fact, Central Advertising, Adams' predecessor, never had the expectancy of a regulation-free environment, once its rooftop billboards were erected. As its predecessor could not have had that expectation, Adams likewise would have no such expectation.

Adams does not raise a meritorious issue and the petition for the writ of certiorari should be denied.

CONCLUSION

The Michigan Supreme Court's decision is plainly consistent and based upon the sound principles enunciated by this Court. Adams has provided no basis for this Court to exercise its discretion to grant the writ. The City of East Lansing hereby requests that this Court deny Adams' petition for a writ of certiorari.

Respectfully submitted,

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